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NO. 10027

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 14 1942

PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WM. FLEET PALMER, Esq.,
United States Attorney,
DANIEL DILLON, Esq.,
Attorney, Department of Justice,
600 U. S. Post Office and Court House
Building,
Los Angeles, California.

For Appellee:

SYLVESTER HOFFMANN, Esq.,
819 Chester Williams Building,
215 West Fifth Street,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern District of California, Central Division.

No. 1100-B (Civil)

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT ON UNITED STATES GOVERNMENT INSURANCE CONTRACT.

Plaintiff complains of defendant and alleges:

I.

That plaintiff is a citizen of the United States of America and a resident of the Southern District of California, Central Division, and of the County of San Bernardino therein.

II.

That this action is brought under the War Risk Insurance Act of October 6th, 1917 and the World War Veteran's Act of June 7th, 1924, and amendatory acts, and is based upon a policy of Life Insurance issued under and by virtue of said acts and the laws of the United States of America to Thomas Joseph Kelley, now deceased, by the defendant.

III.

That while Thomas Joseph Kelley was in the armed forces of the United States during the World

War and prior to his discharge therefrom, he applied for and was granted \$10,000.00 of War Risk Term Insurance and paid all the premiums thereon through the month of January, 1919.

IV.

That on or about March 15, 1932, the said Thomas Joseph Kelley, now deceased, applied for and was granted United States Government Insurance in the sum of \$5,000.00, pursuant to Section 310 of the World War Veterans' Act, as amended, and that the de- [2] fendant issued said policy and that by the terms thereof, plaintiff was named as beneficiary in the event of the death of said Thomas Joseph Kelley while the policy was in full force and effect, said policy being No. K-919,427. That plaintiff is informed and believes and on such information and belief alleges that the premiums on said policy were paid promptly when due, through the month of August, 1935, and thereafter, the exact date being unknown to plaintiff but well known to the defendant.

V.

That the defendant has in its possession said policy, and has refused to deliver the same to plaintiff. That plaintiff is informed and believes and on such information and belief alleges that said policy provides by its terms that it is payable to the beneficiary in a lump sum in the event that the said insured died while the policy was in full force and effect, and that, further, by the terms of said policy,

and by virtue of certain "extended insurance benefits", said policy is still in full force and effect unless matured by the death of the insured, and was in full force and effect at the time of his death. That he died in the County of Los Angeles on or about August 10th, 1935.

VI.

That subsequent to the death of the insured, as aforesaid, and prior to on or about October 6th, 1936, the exact date being unknown to plaintiff but well known to defendant, application was made to the defendant for payment of the benefits due plaintiff under the terms of said policy, and that on or about October 6th, 1936, H. L. McCoy, as Director of Insurance, on behalf of the defendant and the Insurance Claims Council of the Veterans' Administration of the United States, denied liability and disagreed with plaintiff; that thereupon plaintiff appealed to the Administrator of Veterans' Affairs, who, on or about January 22nd, 1936, denied said appeal and affirmed all prior decisions, and that a disagreement exists between the plaintiff and the defendant as to her rights to receive the benefits under said policy, in the sum of [3] \$5,000.00, as such beneficiary.

VII.

That during his lifetime, said Thomas Joseph Kelley kept or performed all of the things to be done, kept or performed on his part, under the terms of said policy or contract, and that plaintiff, between August 10th, 1935, and October 6th, 1936,

the exact date being unknown to plaintiff but well known to the defendant, made due proof to the defendant of her right to such benefits and as to the death of the insured, and as otherwise required by law and the terms of said policy.

VIII.

That plaintiff has employed Sylvester Hoffmann, Esq., an attorney and counsellor at law, duly licensed and admitted to practice before this Court and all other Courts in the State of California, to bring and prosecute this action and that a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is 10% of the amount of insurance recovered and to be paid by the defendant out of the payment to be made under any judgment or decree in favor of plaintiff, payable at a rate not exceeding one-tenth of each such payments until paid, in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

Wherefore, plaintiff prays judgment as follows:

1. For the sum of \$5,000.00 and such other benefits as she may be entitled to as beneficiary under the aforesaid insurance.

2. Determining and allowing plaintiff's attorney a reasonable attorney's fee in an amount not to exceed ten percent (10%) of the amount recovered, and to be paid by the defendant out of the payments to be made under the judgment or decree and in the manner as provided by law.

3. For such other and further relief as may be just, equitable and proper in the premises.

SYLVESTER HOFFMANN

Attorney for plaintiff [4]

United States of America

Southern District of California

Central Division.—ss.

Rosetta Alice Kelley, being by me first duly sworn, deposes and says that she is the plaintiff in the above entitled action; that she has read the foregoing Complaint on United States Government Insurance Contract and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters she believes is to be true.

ROSETTA ALICE KELLEY

Subscribed and sworn to before me this 23rd day of July, 1940.

[Seal]

JOHN HIB

Notary Public in and for the County of San Bernardino, State of California.

[Endorsed]: Filed Aug. 7, 1940. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, the United States of America, by its attorneys, Wm. Fleet Palmer,

United States Attorney for the Southern District of California, Daniel Dillon, Attorney, Department of Justice, and Attilio di Girolamo, Attorney, Department of Justice, and for answer to the complaint filed herein admits, denies, and alleges:

First Defense

I.

Defendant denies the allegations contained in paragraph designated I for want of knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendant admits the allegations contained in paragraph designated II of the complaint.

III.

Defendant admits the allegations contained in paragraph designated III of the complaint.

IV.

Defendant denies the allegations contained in paragraph designated IV of the complaint except as specifically admitted and alleged in the second defense herein. [6]

V.

Answering the allegations of paragraph designated V of the complaint, defendant admits that it now has possession of the policy of insurance therein referred to, admits that said policy of insurance contained a provision for the payment of the proceeds thereof in one sum to the plaintiff

herein in the event the policy matured while in full force and effect by the death of the insured, admits that the insured, Thomas Joseph Kelley, died on August 10, 1935, but denies all of the remaining allegations of said paragraph.

VI.

Defendant denies the allegations contained in paragraph designated VI of the complaint, but in further answer thereto admits and alleges that on August 26, 1935, the plaintiff herein filed in the Veterans Administration a claim for the payment to her of the proceeds of said policy of insurance; that on August 29, 1935, the Director of Insurance of the Veterans Administration rendered a decision to the effect that the insurance was not payable to the plaintiff because in his application for insurance, *executed* March 15, 1932, Thomas Joseph Kelley withheld information material to the risk and made fraudulent misrepresentations in regard to his health and his consultation with and treatment by physicians and thus denied the claim, so notifying the plaintiff on August 29, 1935 and January 8, 1936; that on July 31, 1936, the plaintiff filed an appeal from said decision to the Administrator of Veterans' Affairs and on September 28, 1936, the Administrator rendered a decision affirming the prior action of the Director of Insurance and denying the claim for insurance benefits, of which action the plaintiff was notified by letter

from the Director of Insurance dated October 6, 1936.

VII.

Defendant denies the allegations contained in paragraph designated VII of the complaint. [7]

VIII.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph designated VIII of the complaint but says that in the event of plaintiff's recovery herein, the court may, at its discretion, allow a reasonable attorney's fee subject to the provisions of Section 500, World War Veterans' Act, 1924, as amended.

Second Defense

Further answering herein, defendant says that on March 15, 1932, Thomas Joseph Kelley, not having been protected by yearly renewable term insurance or United States Government life insurance subsequent to the month of January 1919, executed an application for the issuance of United States Government life insurance under the provisions of Section 310, World War Veterans' Act, 1924, as amended, and submitted said application to the Veterans Administration for the issuance of a contract of insurance in the principal amount of \$5,000; that in said application for insurance, Thomas Joseph Kelley represented that he had never applied for Government compensation or

pension, that he was then in good health, that he had never been treated for any disease of the heart or blood vessels or genito-urinary organs, that he had not been ill, contracted any disease, suffered any injury or consulted a physician in regard to his health since the date of his discharge except that he had a hemorrhoidectomy in September 1920; that in said application for insurance the said Thomas Joseph Kelley further represented that he had never had syphilis. Defendant says that, relying upon the representations of Thomas Joseph Kelley in his application for insurance, the Insurance Division of the Veterans Administration, charged with the administration of Government insurance, approved [8] said application for insurance and issued to said Thomas Joseph Kelley a contract of United States Government life insurance in the principal sum of \$5,000, No. K-919,427, and defendant says that the aforesaid representations of Thomas J. Kelley in the said application for insurance were untrue, false and fraudulent in that, contrary to the facts stated in said application, the said Thomas Joseph Kelley had theretofore, on September 3, 1931, filed in the United States Veterans Bureau at Los Angeles, California, his applications for disability compensation and disability allowance representing therein that he then had heart trouble, rheumatism and spinal trouble which had been incurred in 1918 and that he had received treatment by a private physician in September 1930 and March 1931; that pursuant to said applications

for disability compensation and disability allowance, Thomas Joseph Kelley had consulted with and been examined by physicians of the United States Veterans Administration at Los Angeles, California, on October 28, 1931, at which time he had syphilis, manifested by a positive Wassermann, and sortitis; that Thomas Joseph Kelley was then notified of the findings of the Veterans Bureau physicians, Los Angeles, California, and on November 17, 1931, was again notified in writing that he had chronic sortitis. Defendant further says that notwithstanding Thomas Joseph Kelley's representation in his application for insurance that he had not consulted any physicians in regard to his health since the date of his discharge, he had in fact not only consulted physicians of the Veterans Bureau, Los Angeles, California, in regard to his health not more than five months prior to the said application but had also consulted a private physician in regard to his health in September 1930 and March 1931; that, notwithstanding his representation in his application for insurance that he was in good health, the said Thomas Joseph Kelley was not in good health on March 15, 1932, and well knew that he was not then in good health, having theretofore [9] known that he had heart trouble, spinal trouble and rheumatism and having also been informed that he had chronic sortitis. Defendant further says that the said Thomas Joseph Kelley was discharged from the military service of the United States on January 16, 1919, and that in his appli-

cation for insurance he, therefore, falsely and fraudulently represented that he had not consulted a physician in regard to his health since January 16, 1919. Defendant further alleges the facts to be that Thomas Joseph Kelley, on March 15, 1932, well knew that he had theretofore, on September 3, 1931, filed in Los Angeles, California, claims for disability compensation and disability allowance; that he then well knew that he was not then in good health; that he then well knew that he had theretofore consulted physicians in regard to his health since the date of his discharge from service; that, notwithstanding his representations to the contrary, he well knew that he then had syphilis and sortitis; that he misrepresented the facts in regard to the condition of his health, his consultation with and treatment by physicians and *conceal* the facts relating to his filing claims for disability compensation and disability allowance, the state of his health and his consultation with and treatment by physicians, all with the intent to deceive the defendant and thereby procure the issuance of the contract of insurance involved in this action; that if the said Thomas Joseph Kelley had made true statements and a full disclosure of said material facts in his application for insurance, the contract of insurance involved herein would not have been issued, that the said misrepresentations and concealments were not discovered by the Insurance Division of the Veterans Administration until the claim for insur-

ance benefits had been filed in the Veterans Administration by the plaintiff herein.

Wherefore, defendant says that by reason of the false and fraudulent representations and concealments of said Thomas Joseph [10] Kelley in his application for insurance executed on March 15, 1932, plaintiff herein is not entitled to recover under the contract of insurance involved in this action and defendant prays that plaintiff take nothing by her suit.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

ATTILIO DI GIROLAMO

Attorney, Department of Justice.

The defendant hereby serves notice that a jury trial is demanded in the above entitled case. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California—ss.

Eva P. King, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 677 U. S. P. O. and Court

House, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on November 18, 1940 she deposited in the United States Mails in the Post Office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Answer addressed to Sylvester Hoffmann, Attorney-at-Law, 215 West Fifth Street, Los Angeles, California, Attorney for Plaintiff, at which place there is a delivery service by United States Mail from said post office.

EVA P. KING

Subscribed and sworn to before me, this 18 day of November, 1940.

R. S. ZIMMERMAN,

Clerk, U. S. District Court,

Southern District of California

By J. M. HORN

Deputy.

[Endorsed]: Filed Nov. 18, 1940. [12]

At a stated term, to wit: The February Term A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 28th day of May in the year of our Lord one thousand nine hundred and forty-one:

Present:

The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming before the Court for further jury trial of the issues involved in this cause, at the hour of 10:38 o'clock A. M., Sylvester Hoffman, Esq., appearing as counsel for the plaintiff, Rosetta Alice Kelley, who is present in court; Daniel Dillon, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; and Ben A. Bell being present in court as stenographic reporter of the testimony and the proceedings, and the jury being present, and the Court having ordered that the trial be proceeded with, * * *

At the hour of 3:33 P. M., the jury return into the court room, and all being present as before, including counsel for both sides, and the plaintiff being absent, and the court having reconvened, and counsel having stipulated that the jury is present, the jury are asked if they have agreed upon a verdict, and the jury having stated, through its foreman, that it has so agreed, said verdict is

presented by the foreman of the jury to the Court, read by the clerk, and ordered filed and entered herein, to wit:

* * * * * [13]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the jury in the above entitled cause, find in favor of the plaintiff and against the defendant.

Dated: Los Angeles, California, May 28th, 1941.

E. M. GULLICK

Foreman of the Jury.

[Endorsed]: Filed May 28, 1941. [14]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 1100-O'C—Civil

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 27th day of May, 1941, before the

Court sitting with a jury, Sylvester Hoffmann, Esq., appearing for the plaintiff and William Fleet Palmer, United States Attorney and Daniel Dillon, Esq., Attorney for Department of Justice appearing for the defendant; and evidence both oral and documentary having been introduced, the cause argued, and the jury instructed by the Court, and the cause submitted to the jury for its verdict, and the jury having thereupon rendered the following verdict: We, the jury in the above entitled cause, find in favor of the plaintiff and against the defendant.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is Ordered, Adjudged and Decreed that Rosetta Alice Kelley, the plaintiff herein, do have and recover from the United States of America, the defendant, the sum of \$5,000.00, lawful money of the United States, payable in one lump sum payment, pursuant to the terms of that certain United States Government Life Insurance Contract or policy No. K 919427; and the Court having found that the sum of \$500.00 is a reasonable fee for Sylvester Hoffmann, Esq., the attorney for the plaintiff,

It Is Further Ordered, Adjudged and Decreed that said Sylvester Hoffmann, Esq., be, and he is hereby allowed, the said sum of \$500.00, as and for his fee in the prosecution of the above [15] entitled action for the plaintiff, to be paid by the United States Veterans' Administration or its successor to said attorney out of the payment to be made to the

plaintiff, her heirs, personal representatives, executors, administrators and assigns, under this judgment.

Dated: this 2nd day of June, 1941.

J. F. T. O'CONNOR

United States District Judge

Approved as to form:

WM. FLEET PALMER

United States Attorney

DANIEL DILLON

Attorney, Department of Justice

Attorneys for defendant.

[Endorsed]: Filed Jun. 2, 1941.

Judgment entered June 2, 1941.

Docketed June 2, 1941, C. O. Book 5, Page 553.

R. S. ZIMMERMAN,

Clerk,

By FRANCIS E. CROSS

Deputy. [16]

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Rosetta Alice Kelley, Plaintiff in the above entitled case, and

To: Sylvester Hoffmann, Attorney-at-Law, 215 West Fifth Street, Los Angeles, California, her attorney:

You and Each of You are hereby notified that at the calling of the Law and Motion Calendar in the Court of the Honorable J. F. T. O'Connor, one of the Judges of the above entitled Court, at his Court Room in the U. S. Post Office and Court House, Los Angeles, California, on the 16th day of June, 1941, at 10:00 o'clock, A. M., or as soon thereafter as counsel may be heard, the defendant by its counsel will move the Court to vacate the jury verdict heretofore rendered in the above entitled cause on May 28, 1941, and will move for a judgment in favor of the defendant notwithstanding the verdict.

Furthermore, in the event of the denial of the motion for a judgment in favor of the defendant notwithstanding the verdict, the defendant will move that the verdict entered herein be vacated and that the defendant be granted a new trial.

Said motion will be based on the following grounds:

I.

That defendant, by its evidence, established without contradiction that material representations in

the insured's application for insurance were known to be untrue by the insured when made, and that [17] this invalidated the policy without further proof of actual conscious design to defraud, and, accordingly, defendant's motion for a directed verdict should have been given by this Court.

II.

That after defendant had by affirmative evidence established the fact that material misrepresentations had been made in the insured's application for insurance, the same being known to be untrue by the insured, that plaintiff did not by substantial credible evidence establish this fact to the contrary, accordingly, the jury's verdict was contrary to the greater weight of the evidence and that if the jury's verdict is allowed to stand the defendant will suffer an injustice thereby.

Dated this 6th day of June, 1941.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant. [18]

[Title of District Court and Cause.]

MOTION

Comes Now the defendant, the United States of America, by Wm. Fleet Palmer, United States Attorney for the Southern District of California, and Daniel Dillon, Attorney, Department of Justice, and moves the Court that the jury verdict rendered herein on the 28th day of May, 1941, be vacated and that judgment be entered for the defendant notwithstanding the verdict and in accordance with defendant's motion for a directed verdict made at the close of all the evidence.

Furthermore, in the event of the denial of the defendant's motion for judgment notwithstanding the verdict, the defendant moves in the alternative that the verdict be vacated and that the defendant be granted a new trial.

The defendant bases its motion on the following grounds:

I.

That defendant, by its evidence, established without contradiction that material representations in the insured's application for insurance were known to be untrue by the insured when made, and that this invalidated the policy without further proof of actual conscious design to defraud, and, accordingly, defendant's motion for a directed verdict should have been given by this Court.

II.

That after defendant had by affirmative evidence established the fact that material misrepresentations had been made in the insured's [19] application for insurance, the same being known to be untrue by the insured, that plaintiff did not by substantial credible evidence establish this fact to the contrary, accordingly, the jury's verdict was contrary to the greater weight of the evidence and that if the jury's verdict is allowed to stand the defendant will suffer an injustice thereby.

III.

That it was immaterial whether the omission to communicate a material fact by this insured arose from intention, indifference, or mistake, or from it not being present to the mind of the party who should communicate it, that the fact was one which it was material to make known; accordingly, the defendant's motion for a directed verdict at the close of all the evidence should have been sustained.

IV.

That the preponderance of the evidence was in favor of the defendant and the defendant's motion based on that ground at the close of the case should have been granted.

V.

That the verdict of the jury was contrary to the law of the case.

Dated this 6th day of June, 1941.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

[Endorsed]: Filed June 6, 1941. [20]

[Title of District Court and Cause.]

ORDER

The motion of the United States of America to vacate the jury verdict heretofore rendered in the above entitled cause on May 28, 1941, and motion for judgment in favor of defendant notwithstanding the verdict and motion that the defendant be granted a new trial having come on regularly to be heard before the above entitled court on the 16th day of June, 1941, at 10:00 o'clock A. M. of said day and date, the court, after arguments of counsel for the plaintiff and defendant, and after due consideration thereof, hereby denies each and all of said motions made for and on behalf of defendant, United States of America.

Dated at Los Angeles, California this 2nd day of July, A. D. 1941.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Jul. 2, 1941. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, by its counsel Wm. Fleet Palmer, United States Attorney for the Southern District of California, and Daniel Dillon, Attorney, Department of Justice, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment in favor of the plaintiff entered in the above entitled cause on June 2, 1941.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant.

[Endorsed]: Filed Sep. 30, 1941 and copy mailed to Atty. for Plf.

R. S. ZIMMERMAN

Clerk.

By EDMUND L. SMITH,

Deputy. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE THE RECORD ON APPEAL AND TO DOCKET THE CAUSE.

Good cause appearing therefor,

It Is Hereby Ordered that the time within which to file the record on appeal and docket the above-

entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 29th day of December, 1941.

Dated this 5th day of November, 1941.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Nov. 5, 1941. [23]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR THE
TRANSMITTING OF ALL EXHIBITS IN-
TRODUCED AT THE TRIAL TO THE
CIRCUIT COURT OF APPEALS.

(Rule 75(i)).

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that all of the exhibits introduced at the trial of the above-entitled cause may be sent to the Circuit Court of Appeals for the Ninth Circuit, pursuant to Rule 75(i) Rules of Civil Procedure for the District Courts of the United States, and that the Court may make such order for the safekeeping, transportation and return thereof as it deems proper.

Dated this 16th day of January, 1942.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant.

SYLVESTER HOFFMANN

Attorney for Plaintiff.

It Is So Ordered this 16 day of Jan. 1942.

J. F. T. O'CONNOR

United States District Judge.

[Endorsed]: Filed Jan. 16, 1942. [24]

[Title of District Court and Cause.]

STIPULATION AS TO THE
RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the following hereinafter enumerated parts of the record, proceedings, and evidence be included in and shall constitute the record on appeal herein, pursuant to Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States:

1. Complaint
2. Answer
3. Minute Order directing filing of Jury Verdict
4. Judgment
5. Defendant's Notice of Motion and Motion for Judgment Notwithstanding the Verdict

6. Minute Order denying defendant's Motion for Judgment Notwithstanding the Verdict

7. Reporter's complete transcript of all proceedings and all exhibits introduced in evidence at the trial including deposition on behalf of defendant of Richard B. Posey. [25]

8. Notice of Appeal

9. Order extending time to December 29, 1941, to file the record on appeal and to docket the cause.

10. Order extending time to January 29, 1942, to file the record on appeal and to docket the cause, signed by Albert Lee Stephens, Judge, United States Circuit Court of Appeals, for the Ninth Circuit.

11. Stipulation and order for transmitting all exhibits

12. This stipulation designating the contents of the record on appeal

13. Certificate of Clerk authenticating the record.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant.

SYLVESTER HOFFMANN

Attorney for Plaintiff.

[Endorsed]: Filed Jan. 16, 1942. [26]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 26 inclusive contain full, true and correct copies of Complaint; Answer to Complaint; Minutes and Order on Return of Verdict; Verdict; Judgment; Notice of Motion and Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial; Order Denying Motions; Notice of Appeal; Order Extending Time to Docket Appeal; Stipulation and Order for Transmittal of Original Exhibits; Stipulation Designating Contents of Record on Appeal, which together with the Reporter's Transcript of Testimony and Proceedings, Exhibits and Deposition transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of the said District Court this 21st day of January, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk

By EDMUND L. SMITH,

Deputy.

[Title of District Court and Cause.]

TESTIMONY

Appearances:

For the Plaintiff:

SYLVESTER HOFFMAN, Esq.,
819 Chester Williams Building,
Los Angeles, California.

For the Defendant:

WM. FLEET PALMER,
United States Attorney; and
DANIEL DILLON,
Attorney
Department of Justice. [1*]

Los Angeles, California

Tuesday, May 27, 1941—10:00 o'clock A. M.

The Court: Rosetta Kelley vs. United States,
for jury trial.

Mr. Hoffman: Ready for Plaintiff.

Mr. Dillon: Government is ready, your Honor.

The Court: Very well. Call the jury.

(Whereupon a jury was impaneled to try the case.)

Mr. Hoffman: Plaintiff asks that we may amend the complaint. The last line of page 1, Paragraph IV, your Honor, starts out with the figures "510." The last word before that in the line above says "Section 510." That should be "310," and counsel has no objection to such an amendment. The fact is, that is the section of

*Page numbering appearing at top of page of original certified Reporter's Transcript.

the statute that authorizes the policy to be issued.

I ask the Government, is it stipulated that Rosetta Alice Kelley, the Plaintiff, was a citizen of the United States in the Southern District of California, Central Division, County of San Bernardino, on August 7, 1940 at the time the complaint was filed.

Mr. Dillon: So stipulated.

Mr. Hoffman: And, your Honor, it is admitted by the pleadings that Thomas Joseph Kelley was in the armed forces of the United States during the World War and had applied for [2] and was granted War Risk insurance.

The Court: That is admitted by the answer. That is Paragraph II.

Mr. Hoffman: Paragraphs II and III are both admitted. Therefore, under Section 310 of the World War Veterans Act Mr. Kelley was entitled to the Government insurance; and it will be stipulated, will it not, Mr. Dillon, that effective the first day of March, 1932 a United States Government 23-year endowment policy No. K919427 in the face value or amount of \$5,000 was issued to Thomas Joseph Kelley upon his application therefor in writing.

The Court: Where is that allegation?

Mr. Hoffman: Paragraph IV, your Honor.

The Court: On page 2?

Mr. Hoffman: Beginning on page 1. Do you admit that such a policy was issued?

Mr. Dillon: So stipulated.

Mr. Hoffman: I now offer in evidence, your Honor, the policy, with the exception of a certain rubber stamp that was placed on the top of the policy and which was placed there subsequent to its delivery to the Government by Mrs. Kelley.

The Court: It will be admitted in evidence as Plaintiff's Exhibit 1.

Mr. Hoffman: It is also admitted, your Honor, by the pleadings that Mr. Kelley died August 10, 1935. That is so [3] stipulated.

Mr. Dillon: So stipulated.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

PLAINTIFF'S EXHIBIT No. 1

Age of Insured—39

Monthly	\$15.05
Quarterly	45.00
Semiannual	89.65
Annual	177.80

Amount of Insurance.

The United States of America
 Hereby Grants Insurance
 of Five Thousand, \$5,000 Dollars
 to .

Insured.

Thomas Joseph Kelley (the Insured).

Premium.

This insurance is granted in consideration of and subject to the terms and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of \$15.05, due and payable on the day this policy takes effect and on the first day of each succeeding month during the lifetime of the Insured, until premiums for twenty three full years shall have been paid on this policy. Receipt of the first premium is hereby acknowledged.

Endowment to Insured.

This insurance is payable to the Insured in one sum of \$5,000 on the first day of March Nineteen Hundred and Fifty Five (the end of the Endowment Period), if the Insured be then living and the policy in force, and if no monthly installments

on account of total permanent disability have been paid as hereinafter provided.

Mode of Payment at Death or Disability.

This insurance is payable in monthly installments of \$28.75 (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death before the end of the Endowment Period, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured before the end of the Endowment Period, this insurance is payable in accordance with the Optional Settlement so selected.

Beneficiary.

This insurance, subject to the beneficiary provisions hereof, is payable to Rosetta Alice Kelley, his wife, hereinafter called the beneficiary, in one sum.

Disability Benefits to Insured.

Upon due proof of the total permanent disability of the Insured before the end of the Endowment Period and while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the Insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

Death Benefits to Beneficiary.

Upon due proof of the death of the Insured before the end of the Endowment Period and while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any paid to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two hundred and forty or more installments shall have been paid to the Insured on account of total permanent disability, no death benefit shall be payable. If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability payments.

Place of Payment.

All payments under this policy shall be payable at the United States Treasury in the City of Washington, District of Columbia.

Dividends.

This insurance shall participate in dividends from gains and savings.

Conditions.

The conditions, benefits, and privileges recited on the succeeding pages hereof constitute a part of this contract.

This policy takes effect on the first day of March,
Nineteen Hundred and Thirty Two.

FRANK T. HINES

Director

Countersigned at Washington, D. C.

Examined.

S. J. WALLS

Registrar

[Stamped across face]: Policy Canceled. Do not
remove from folder. By [Illegible]. Date 9/14/38.

Conditions, Benefits, and Privileges.

Payment of Premiums.

1. Premiums are due and payable on the first day of each calendar month in advance in legal tender of the United States of America to the Treasurer of the United States in the City of Washington, District of Columbia.

Premiums may be paid annually, semiannually, or quarterly, in advance, in which case the premium payable will be the sum of the monthly premiums for the period discounted at three and one-half per centum per annum. The discounted premiums for these periods are stated on the first page hereof. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, if living, otherwise to the beneficiary.

If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

Grace for Payment of Premiums.

2. For the payment of any premium under this policy, a grace of thirty-one days without interest will be allowed, during which time the policy will remain in force; but if the policy shall become a claim within the grace period, the unpaid premiums shall be deducted from the amount of insurance payable.

Reinstatement.

3. This policy, if it has not been surrendered for a cash-surrender value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Bureau of War Risk Insurance, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy.

Dividends.

4. This policy shall participate in and receive such dividends from gains and savings as may be determined by the Director of the Bureau of War Risk Insurance with the approval of the Secretary of the Treasury. Any dividends so apportioned may be taken in cash, and if not so taken, shall be left on deposit to accumulate at such rate of interest as the Secretary of the Treasury may determine, but at a rate never less than three and one-half per centum compounded and credited annually, and payable, if not previously withdrawn, at the maturity of this policy to the person entitled to its proceeds.

Cash Surrender and Loan Provisions.

5. Cash-surrender value, paid-up insurance, extended insurance, and policy-loan provisions as follows shall be effective only after premiums for twelve full months have been paid—all values, reserves, and net single premiums being based on the American Experience Table of Mortality, with interest at three and one-half per centum per annum:

Cash Surrender Value.

(a) Upon written request therefor by the Insured made while this policy is in force or not later than three calendar months after the due date of the premium in default, and upon complete surrender of this policy with all claims thereunder, the United States will pay to the Insured the cash-surrender value hereof. The said cash-surrender

value at the end of any policy year for which premiums have been paid in full, if no installments on account of total permanent disability have been paid, shall be the reserve, together with any dividend accumulations left on deposit, less any indebtedness under this policy. For each month within any policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year.

Paid-Up Insurance.

(b) If the policy has not been surrendered for a cash-surrender value, upon default in payment of premium and upon written request of the Insured and complete surrender of this policy with all claims thereunder within three calendar months after the due date of the premium, the Bureau of War Risk Insurance will issue paid-up insurance for such amount, payable in one sum at death before the end of the Endowment Period, or at the end of the Endowment Period, as the then cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. The paid-up insurance shall be with right to total permanent disability benefits and with right to dividends. The monthly installment payable upon due proof of total permanent disability of the Insured under such paid-up insurance shall be a sum that bears the same proportion to the monthly installment as the amount of the paid-up policy bears to the commuted

value of two hundred and forty monthly installments. The Insured may at any time surrender the paid-up policy for its cash-surrender value, or obtain a loan on such paid-up insurance provided no payments have been made on account of total permanent disability.

Extended Insurance.

(c) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended automatically as Term Insurance payable in monthly installments for such time from the due date of the premium unpaid as the cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. The extended insurance shall be with right to total permanent disability benefits and with right to dividends payable in cash only. The number of the monthly installments will in any event be the same as may then be payable hereunder. If there is no indebtedness, the amount of the monthly installment or amount of insurance payable will be the same as may then be payable hereunder excluding dividend accumulations; and if there is an indebtedness, the amount of the monthly installment or amount of insurance payable hereunder shall be reduced in the proportion which the indebtedness bears to the commuted value of the monthly installments payable hereunder, excluding dividend accumulations—said commuted value being determined upon the basis of interest at three and one-half per

centum per annum. If the cash-surrender value shall be more than enough to purchase extended insurance to the end of the Endowment Period, the excess shall be used to purchase Pure Endowment, payable in one sum at the end of the Endowment Period if the Insured is then living. The extended insurance shall not have a loan value, but shall have a cash value.

Policy Loans.

(d) At any time after this policy shall have been in force for one year, and before default in payment of any subsequent premium, and upon execution of a loan agreement, the United States will lend to the Insured on the sole security of this policy any amount which together with any existing indebtedness shall not exceed ninety-four per centum of the cash-surrender value of an insurance without indebtedness. The sum advanced shall bear interest at a rate not exceeding six per centum per annum, the interest being payable annually, and at any time before default in payment of premium may be repaid in full or in amounts of Five Dollars or any multiple thereof. Failure to pay either the amount of the loan or the interest thereon shall not avoid this policy unless the total indebtedness shall equal or exceed the cash-surrender value of an insurance without indebtedness. When the amount of the indebtedness equals or exceeds the cash-surrender value of an insurance without indebtedness this policy shall cease and become void.

TABLE OF GUARANTEED SURRENDER VALUES.

End of Policy Year.	Cash-Surrender Value for Each \$1,000 of Insurance. (Full reserve of policy.)	Paid-up Insurance with Disability Benefits for Each \$1,000 of Insurance.	Extended Insurance with Disability Benefits.		
			Years.	Days.	Pure Endowment.
1	\$ 27.29	\$ 52.02	2	346	.....
2	55.61	103.28	6	4	.....
3	85.01	153.78	9	9	.....
4	115.54	203.51	11	290	.....
5	147.23	252.44	14	85	.....
6	180.12	300.55	16	128	.....
7	214.27	347.85	16	.....	\$ 66.72
8	249.70	394.28	15	.....	148.87
9	286.50	439.90	14	.....	227.38
10	324.69	484.64	13	.....	302.30
11	364.34	528.53	12	.....	373.80
12	405.51	571.58	11	.....	441.94
13	448.30	613.80	10	.....	506.91
14	492.80	655.21	9	.....	568.76
15	539.14	695.88	8	.....	627.59
16	587.44	735.80	7	.....	683.50
17	637.90	775.06	6	.....	736.59
18	690.68	813.68	5	.....	786.91
19	746.05	851.76	4	.....	834.58
20	804.20	889.36	3	.....	879.65
25	.....	.....	.....	.....	.....
30	.....	.....	.....	.....	.....

The above values are based on an insurance of \$1,000 without indebtedness, and with no dividends standing to the credit of the policy, and no installments having been paid on account of total permanent disability. If this policy provides for a larger amount of insurance than \$1,000, the cash-surrender values, loan values, and paid-up insurance values will be increased proportionately. The periods of extended insurance as given in the above table are

the same irrespective of the amount of the insurance, but the amount of Pure Endowment is proportionate to the amount of insurance.

Indebtedness at Maturity of Policy.

6. At the maturity of this policy by death or disability, any indebtedness, unless paid off in cash, shall be liquidated by reducing the monthly installment in the proportion which the indebtedness bears to the commuted value of the monthly installments, as may then be payable hereunder, excluding dividend accumulations. If the policy shall mature as an Endowment, or be payable in one sum at death, any indebtedness shall be deducted from the amount payable under the policy.

Incontestability.

7. This policy shall be incontestable from the date it takes effect, except for nonpayment of premiums, and it is issued free of restrictions as to travel, residence, occupation, or military or naval service, except that the discharge or dismissal of the Insured from the military or naval forces of the United States on the ground that he is an alien enemy, conscientious objector, or a deserter, or as guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct shall terminate this insurance and bar all rights thereunder.

Incontestability Provision as Amended.

This policy shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, non-payment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and the policy is issued free of restrictions as to travel, residence, occupation, or military or naval service. However, no insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy: Provided, That the cash value hereof less any indebtedness on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the Insured, the said value shall be paid to the estate of the Insured.

Misstatement of Age.

8. If the age of the Insured has been understated, the amount of the insurance payable under the policy shall be such exact amount as the premium paid would have purchased at the correct age; if overstated, the excess of premiums paid shall be refunded without interest. Guaranteed surrender and loan values will be modified accordingly. The age of the Insured will be admitted by the Bureau of War Risk Insurance at any time upon satisfactory proof.

Total Permanent Disability.

9. Total permanent disability as referred to herein is any impairment of mind or body which

continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums becoming due after the date of such disability and within such six months, if paid, shall be refunded without interest. Without prejudice to any other cause of disability, it is agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet, or the loss of one hand and one foot, shall be considered as total permanent disability within the meaning of this contract; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums becoming due after such disability, if paid, shall be refunded without interest. If there is a loan under this policy, then payments on account of total permanent disability shall be adjusted accordingly.

If one or more monthly installments be paid on account of total permanent disability, the Insured may at the end of the Endowment Period surrender this contract for the commuted value of the installments (two hundred and forty less the number paid) less any indebtedness.

Recovery from Disability.

Notwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Bureau of War Risk Insurance of the continuance of such total permanent disability, and if the Insured shall fail to furnish such proof, all payments of monthly installments on account of such disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter the premium to be paid, and the cash-surrender values, paid-up insurance values, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The extended-insurance values shall be modified accordingly. The amount payable at the end of the Endowment Period shall be the commuted value of the installments (two hundred and forty less the number paid) less any indebtedness.

Total Permanent Disability Benefits Under Paid-Up Insurance

If one or more monthly installments be paid on account of total permanent disability incurred under a paid-up insurance, then there shall be paid upon the surrender of this policy at the death of the

Insured before the end of the Endowment Period or at the end of the Endowment Period a sum equal to the difference between the amount of such paid-up insurance and the difference between the commuted value of two hundred and forty reduced installments and the commuted value of the reduced installments (two hundred and forty less the number paid).

Total Permanent Disability Benefits During Period of Extended Insurance.

In case total permanent disability occurs during the period of extended insurance and payments are made on account of such disability and recovery from such disability also takes place, then, (a) if the recovery takes place before the end of the period of extended insurance, the insurance and Pure Endowment, if any, shall be reduced accordingly, and the insurance, as reduced, shall be continued in force until the end of such period; (b) if the recovery takes place after the end of the period of extended insurance but before the end of the Endowment Period, all rights and claims hereunder shall cease.

In case the Insured is totally and permanently disabled during the period of extended insurance and dies, then, (a) if the Insured dies before the end of the period of extended insurance, there shall be paid the remaining unpaid monthly installments payable and applicable as they come due, unless a different mode of payment has been elected; (b) if

the Insured dies after the end of the period of extended insurance but before the end of the Endowment Period, no death benefits will be payable.

If one or more monthly installments be paid on account of total permanent disability incurred during the period of extended insurance, the amount of the Pure Endowment payable to the Insured on the surrender of this contract at the end of the Endowment Period will be the same sum as may be payable hereunder less the difference between the commuted value of two hundred and forty monthly installments and the commuted value of the installments (two hundred and forty less the number paid).

Assignment.

10. The proceeds of this policy shall not be assignable, except that any person to whom this insurance shall be payable may assign his interest in this insurance to any other beneficiary within the class permitted by the War Risk Insurance Act or any amendment or supplement thereto. No such assignment of this policy shall be binding upon the United States unless in writing and until filed in the Bureau of War Risk Insurance, Washington, D. C. The United States assumes no responsibility for the validity of any assignment. The proceeds of this policy shall not be subject to the claims of creditors of the Insured or creditors of any beneficiary to whom the proceeds may be awarded, except claims

of the United States arising under the War Risk Insurance Act.

Exempt from Taxation.

11. The proceeds of this policy are exempt from all taxation.

Beneficiary.

12. The Insured shall have the right at any time, and from time to time, and without the consent or knowledge of the beneficiary, to change the beneficiary under this policy within the class permitted by the War Risk Insurance Act or any amendment or supplement thereto. Every change of beneficiary must be made by notice, signed by the Insured, to the Bureau of War Risk Insurance at its office in Washington, D. C. (accompanied by the policy for an indorsement of the change thereon by the said Bureau), and shall not take effect unless such change is indorsed on the policy. After such indorsement the change shall be deemed to have been made as of the date the Insured signed said written notice of change whether the Insured be living at the time of said indorsement or not; provided, however, that any payment made to a beneficiary of record before notice of change of beneficiary has been received and recorded by said Bureau shall not be made again to the changed beneficiary. The Insured may also exercise any right or privilege given under the provisions of this policy without the consent of the beneficiary. An original designation of a beneficiary

may be made by last will and testament, but no change of beneficiary may be made by last will and testament.

If no beneficiary within the permitted class be designated by the Insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the Insured, then there shall be paid to the Estate of the Insured the remaining unpaid monthly installments payable and applicable as they come due, unless otherwise elected.

If the designated beneficiary survives the Insured and dies before receiving all the installments payable and applicable, then there shall be paid to the Estate of such beneficiary the remaining unpaid monthly installments payable and applicable as they come due unless otherwise elected.

Change to Other Forms.

13. At any time within five years from the effective date hereof upon complete surrender while in force, this policy may be exchanged, without medical examination, for a policy of the same amount, bearing the same date and based on the same age, on any plan issued by the Bureau of War Risk Insurance at a higher rate of premium, upon payment of the difference between the reserve on the new policy and the reserve on this policy.

Optional Settlement.

14. (a) At the date of the maturity of the Endowment, instead of receiving payment in one sum the Insured may elect to receive payments in

monthly installments for thirty-six months or not more than two hundred and forty months. Should the Insured die before receiving all of such monthly installments, the commuted value of the remaining unpaid monthly installments shall be payable to the estate of the Insured.

(b) The Insured may select one of the Optional Settlements set forth below, but notice of the selection shall not be valid unless and until it is recorded in the Bureau of War Risk Insurance. The Insured may revoke his selection of the Optional Settlement but the revocation shall not be valid unless and until it is recorded in the Bureau of War Risk Insurance. If the Insured does not select one of said Optional Settlements, then he shall be deemed to have made no election, and the insurance shall be payable in two hundred and forty monthly installments, unless an election under Option 2 or Option 3 is made by the beneficiary.

If the Insured has not made an optional selection, a designated beneficiary or beneficiaries, at the maturity of this policy by death, may select settlement under Options 2 or 3 as set forth below, but the selection shall not be valid unless and until it is recorded in the Bureau of War Risk Insurance. If the Insured has made an optional selection, a designated beneficiary, at the maturity of this policy by death, may elect to receive such insurance in installments spread over a greater period of time than that selected by the Insured.

Settlement under one of these options shall be considered full and complete settlement of all liability under this contract.

The values shown in the following options are based on an insurance of \$1,000 without indebtedness. If there is indebtedness under this policy, or the Insured has received any payments on account of total permanent disability, the values will be decreased accordingly. If this policy provides for a larger amount of insurance than \$1,000, the values will be increased proportionately.

Optional Settlements in Lieu of Monthly Installments of \$5.75 Payable on the Death of the Insured Under the Terms of This Policy, Subject to the Beneficiary Provisions Hereof.

Option 1.

Insurance Payable in One Sum.—Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made, \$1,000 will be payable in one sum at the maturity of this policy by death.

Option 2.

Insurance Payable in Elected Installments.—The installments noted below will be payable for an agreed number of months (not less than thirty-six) to the designated beneficiary, but if such beneficiary

dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof.

Number of Monthly Installments	Amount of Each Monthly Installment
36	\$29.19
48	22.27
60	18.12
72	15.35
84	13.38
96	11.90
108	10.75
120	9.83
132	9.09
144	8.46
156	7.94
168	7.49
180	7.10
192	6.76
204	6.47
216	6.20
228	5.97
240	5.75

Option 3.

Insurance Payable in Installments Throughout Life.—The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before two hundred and forty such installments have been paid, the remaining unpaid monthly installments

will be payable in accordance with the beneficiary provisions hereof.

Age of Beneficiary at Time of Death of Insured	Amount of Each Monthly Installment
10	\$3.67
15	3.75
20	3.84
25	3.96
30	4.11
35	4.30
40	4.52
45	4.79
50	5.07
55	5.35
60	5.56
65	5.70
70	5.75
75	5.75

Amounts of Monthly Installments for Other Ages
Will Be Furnished Upon Request.

Authority.

This insurance is granted under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. No person, except the Director of the Bureau of War Risk Insurance, under the direction of the Secretary of the Treasury, nor any other person unless authorized by the Secretary of the Treasury, may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind

the United States by making any promise respecting any benefits hereunder.

[Rubber stamp]: This policy is issued under the [illegible] of and subject to [illegible] World War Veteran Act, 1921 as amended.

Frank T. Hines

The United States of America
GOVERNMENT LIFE INSURANCE

Policy No. K919427

Amount \$5,000

Name

Thomas Joseph Kelley

Notice

It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm, or corporation in collecting the insurance under this policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Bureau of War Risk Insurance, Washington, D. C.

23-Year Endowment Policy

[Endorsed]: Plf. Exhibit No. 1. Filed 5/27/41.
By Cross, Deputy Clerk.

Mr. Hoffman: Will it also be stipulated that the policy provided by its terms for payment of premiums of \$15.05 each and every month, and that all the premiums were paid at the rate of \$15.05 each and every month to and including the premium due August 1, 1935; and that with the payment of that

premium that policy was kept in effect until 30 days after September 1, 1935. Is that correct, Mr. Dillon?

Mr. Dillon: So stipulated.

Mr. Hoffman: And it was in effect by the payment of premiums at the time of the death of the insured, Thomas Joseph Kelly.

Mr. Dillon: So stipulated, unless the defense of the Government is sustained.

Mr. Hoffman: Will it also be stipulated that within the time allowed by law the Plaintiff, Mrs. Kelley, made a demand upon the Government for payment of the insurance, and they have denied her claim and disagreed with her, and that a disagreement exists.

Mr. Dillon: I think you better give the details rather than a general statement.

Mr. Hoffman: Would you admit, then, that the allegations of Paragraph VI of the complaint are true, that subse- [4] quent to the death of the insured, as aforesaid, and prior to on or about October 6, 1936, application was made to the Defendant for payment of benefits due the Plaintiff under the terms of the policy; and that on or about October 6, 1936 H. L. McCoy, Director of Insurance, on behalf of the Defendant and the Insurance Claims Council of the Veterans' Administration of the United States, denied liability and disagreed with the Plaintiff; that thereupon Plaintiff appealed to the Administrator of Veterans' Affairs, who, on or

about January 22, 1936, denied said appeal and affirmed all prior decisions, and that a disagreement exists between the Plaintiff and the Defendant as to her rights to receive the benefits under said policy as such beneficiary; and that the Director of Insurance and the Administrator of Veterans' Affairs advised the Plaintiff of their action.

Mr. Dillon: I still say it would be much better to put the specific dates in there.

Mr. Hoffman: Have you got them? What was the date of the demand?

Mr. Dillon: It is stipulated and agreed that claim for insurance benefits on the policy herein sued upon was received by the Veterans' Administration August 26, 1935. Same was denied August 29, 1935. Appeal from this decision was taken, and was received by the Veterans Administration on July 3, 1936. On September 28, 1936 the Administrator of Veterans' Affairs approved the decision and in a letter under [5] date of August 6, 1936 beneficiary represented was so informed.

Mr. Hoffman: The action, your Honor, was filed August 7, 1940 within the time allowed by law.

Mr. Dillon: So stipulated.

Mr. Hoffman: I desire to read, your Honor, parts of Plaintiff's Exhibit 1 for identification.

The Court: That is in evidence.

Mr. Hoffman: I am sorry, your Honor; Exhibit 1.

(Reading Exhibit.)

Mr. Hoffman: Will it also be stipulated, Mr. Dillon, that no part of the premiums paid by Mr.

Kelley have been repaid to his widow, the beneficiary?

Mr. Dillon: So stipulated.

Mr. Hoffman: Plaintiff rests, your Honor.

The Court: Proceed.

Mr. Dillon: May I make an opening statement, if your Honor please?

The Court: Yes.

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mr. Dillon: May I have this marked for the purpose of identification as Government's Exhibit?

The Clerk: Government's Exhibit A for identification.

(The document referred to was marked Government's Exhibit A for identification.)

Mr. Dillon: Government at this time introduces into [6] evidence Government's Exhibit A. Will counsel admit that the signature of Mr. Kelley attached thereto is his signature?

Mr. Hoffman: Yes; we will stipulate that Mr. Kelley signed the document marked Exhibit A for identification.

The Court: Is it offered now in evidence?

Mr. Dillon: Yes, your Honor.

The Court: Admitted.

(The document referred to was received in evidence and marked Government's Exhibit A.)

UNITED STATES VETERANS BUREAU
Insurance Division
Form 739—Rev. Oct. 1923

APPLICATION FOR UNITED STATES GOVERNMENT LIFE INSURANCE
IN ACCORDANCE WITH THE PROVISIONS OF THE WORLD WAR VETERANS' ACT, 1924 AS AMENDED, AND BUREAU REGULATIONS
(BEFORE FILLING OUT THIS APPLICATION, READ INSTRUCTIONS ON BACK PAGE)

1	MY NAME IN FULL: (Please print or type)	First Thomas Joseph	Middle	Last name Kelley
2	(a) RESIDENCE: Number 1172 Western Ave	Street or rural route San Bernardino California		County, city, town, or post office State
	(b) MAIL PREMIUM NOTICES TO: 1172 Western Ave	San Bernardino Calif.		
3	I WAS BORN AT Cryetal Lake	City, town, or post office Colorado	State 20th	Day of month Sept
			Month 189	Year 39 Yrs
4	Did you serve in the military or naval forces of the United States in the course of the World War (April 6, 1917, to July 2, 1921)? (Answer "Yes" or "No") Yes			
5	Rank and grade, or rating Cpl.	Rank and organization at time of discharge 346 Machine gun Bn.	SERIAL NUMBER 2255294	Date of enlistment Sept 19 1917
				Date of discharge 1.16.1919
6	AMOUNT OF INSURANCE APPLIED FOR, \$ 5000.00			
	PLAN OF INSURANCE APPLIED FOR Endowment Age 62 (Enter plan selected, whether Ordinary Life, 20-payment Life, 30-payment Life, 20-year Endowment, 30-year Endowment, Endowment at age 62, or 8-year Convertible Term. Make separate application for each different plan.)			
8	I WILL PAY PREMIUMS AS INDICATED BELOW: (Make cross mark X and insert amount of premium under method selected)			
	Monthly <input checked="" type="checkbox"/>	Quarterly <input type="checkbox"/>	Semiannually <input type="checkbox"/>	Annually <input type="checkbox"/>
	\$17.32			
9	Do you apply for total disability benefits for which an extra premium is required? (Answer "Yes" or "No") No			
10	I REQUEST THAT THE EFFECTIVE DATE of this policy be made the first day of March 1st 1932 (The insurance hereby applied for, if granted, shall become effective on the first day of the month in which valid application and tender of necessary premiums are made and forwarded to the United States Veterans Bureau, unless the applicant specifically requests on his application that it be made the first day of the following month.)			
11	Full name of beneficiary (If married woman, her own first and middle name and husband's last name must be stated) Rosetta Alice Kelley	Relationship to me Wife	Am't. of Ins. for each beneficiary \$5000.00	Post office address (a) Number and street (b) City, town, or post office. 1172 Western Ave San Bernardino Calif
12	I desire the proceeds of this policy paid in the event of my death under the following optional settlement indicated by cross mark X below. (See back page for explanation.)			
	No. 1 (<input checked="" type="checkbox"/>) one sum.	No. 2 (<input type="checkbox"/>) payable in <u> </u> limited installments	No. 3 (<input type="checkbox"/>) continuous installments.	
13	Have you ever applied for (a) Government compensation No ? (b) Training allowance No ? (c) Government insurance No ?			
14	(a) Pension No ? If so, give reference number <u> </u>			
14	(a) Has any application for insurance on your life ever been declined? No (b) Has a policy been offered with plan or amount different from policy applied for? No (c) Has a policy been offered at a premium rate higher than the standard at your age? No If answer to any of these questions is "Yes," describe fully and give dates:			
15	I enclose herewith remittance payable to the TREASURER OF THE UNITED STATES by <u> </u> (Draft Money order Check) in the amount of \$ <u> </u> to cover (a) the first <u> </u> premium of \$ <u> </u> on the amount and plan of insurance applied for, plus (b) the (Write above whether monthly, quarterly, semiannual, or annual.) first <u> </u> premium of \$ <u> </u> for the total disability benefits applied for. (The applicant must remit with this application a sum not less than the amount of the first monthly premium on the amount and plan of insurance applied for, plus the first monthly premium for the total disability benefits if applied for in answer to Question 9.)			
SIGNED AT	San Bernardino Calif	ON THE 15	DAY OF March	32
WITNESSED BY	Thomas Joseph Kelley (A printed name here. Do not print signature)			
ADDRESS	1172 Western Ave San Bernardino Calif			

The law provides that "Whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both."

CALIF. 9382

MEDICAL EXAMINATION **1. APPLICANT'S OWN STATEMENT**

16 Date of birth. <i>Sept 23 - 1892</i>	17 Place of birth. <i>Crystal Lake, Cal</i>	18 Race <i>white</i>	19 Single, married, or widowed. <i>married</i>
20 Family record	Age if living	Health good or bad (If not good, give full details)	Age at death
			Cause of death
Father	<i>80</i>	<i>Good for age</i>	
Mother			<i>42. sclerosis of liver 1908</i>
Sister	<i>1 37</i>	<i>Good</i>	
Brother	<i>2 30</i>	<i>Good</i>	
	<i>32</i>	<i>Good</i>	

21 What operations have you had? Describe fully, giving dates, also name and address of attending surgeon.
*Hemorrhoidectomy Sept 1920 - Conflict Recovery
 Dr. Guy Cochran Los Angeles*

22 Have you ever used wines or liquors to excess? <i>no</i>	23 Have you ever used opium, morphine, cocaine, or other habit-forming drugs? <i>no</i>	24 What is your occupation? <i>RR Fireman</i>	25 Are you now in good health? <i>yes</i>
--	--	--	--

26 Have you ever been treated for any disease of brain or nerves, throat or lung, heart or blood vessels, stomach, liver, intestines, kidney or bladder, genito-urinary organs, skin, glands, ear or eye, bone? (Answer each "Yes" or "No" If "Yes," describe fully and give dates.)
no no no no no no no no no no

27 Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since date of discharge? (Answer "Yes" or "No.") *no* If so, give dates and full particulars, including the name and address of physician.
Hemorrhoidectomy Sept 1920 - no other trouble - no

28 Are you now permanently and totally disabled? (Answer "Yes" or "No.") *no*

Signed by applicant in the presence of Medical Examiner on this *15* day of *March*, 19*22*

James W. [Signature]
 (Signature of applicant)

2. MEDICAL EXAMINER'S REPORT (Examination not acceptable if made by a relative of applicant)

29 Height in shoes. <i>5 ft. 1 1/2 in.</i>	30 Weight, cost and cost off. <i>172 lb. or weighing 172 lb.</i>	31 Girth of chest, normal <i>34</i> in.; forced expiration <i>33</i> in.; forced inspiration <i>36</i> in.	32 Girth of abdomen <i>34 1/2 in.</i>
33 STATE PULSE RATE: (a) Before exercise <i>76</i> (b) Immediately after <i>120</i> (c) One minute after <i>80</i> (d) Two minutes after <i>78</i>	34 Blood pressure Systolic <i>120</i> Diastolic <i>80</i> If abnormal, give cause		

35 After examination do you find any abnormality of the heart? no
Is it irregular? no Does it intermit? no Is there a murmur? no
(If any heart disability is found or suspected, a complete and detailed report should be submitted on a separate sheet)

36 Has applicant's weight increased recently? no Diminished? no If so, state cause, how much, and within what period. nothing

37 After examination, do you find any abnormality of the lungs? no (Afternoon temperature is required in slender persons with suspected tuberculous tendency or with suspicious signs.) Obtain a careful history of every so-called pleurisy case with special reference to duration, effusion, and what disease it followed. Record the facts here. If any abnormality of the lungs exists, make a special detailed report on a separate sheet.)
Temperature 78 - 1 30 am

38 After an examination do you find any abnormality of the nervous system? no Skin? no Ear? no Eye? no
Abdomen? no or digestive system? (Answer each "Yes" or "No" If "Yes" describe fully.)

* Note: In case a neuropsychiatric disability exists a complete report by a competent neuropsychiatrist should be submitted on separate sheet

39 URINALYSIS: Specific gravity 1020 Albumin no Casts no Have you knowledge that the urine examined was passed by the applicant at the time of examination? yes
Reaction acid Sugar no Test used products

40 Has applicant ever had syphilis, gonorrhea, or rheumatism? (State which) no 41 Any defects in the sight or hearing? no 42 Any deformity or departure from normal in any respect? no

43 Has the applicant lost an eye, hand or arm, foot or leg? no 44 Is the ability to work impaired in any way? If so state particulars. no

45 Is the applicant ruptured? no Is it reducible? no Give type, size, and location no

46 How long have you known applicant? 9 yrs By what person are you introduced to the identity of the person examined? Personal acquaintance Give some mark of identification. none

47 Are you related to applicant? no 48 Was this examination made at your home or office, or at applicant's home? State place and address. my office 529 - 5th St. San Bernardino Calif

49 Do you recommend acceptance of the risk? yes 50 Are answers to questions of medical examination in your own handwriting? yes
First-class risk yes Fair risk no Poor risk no

51 FEMALES: Any history of uterine or ovarian diseases? no Married: If pregnant, month advanced? no Date of last confinement? no Was it normal? no Number of miscarriages, if any, and dates. no

52 Are you satisfied that everything has been fully stated regarding the physical condition, habits, personal and family history of the applicant? yes

53 REMARKS:

FOR CENTRAL OFFICE USE ONLY
(Do not write in this space)

54 Examination James Joseph Kelly
(Name of person examined)

made and signed this 15

day of March 1932

Walter D. Jones, M.D.
(Signature - Official designation)

529-5th St. San Bernardino Calif
(Address)

California
(Name of State in which you are licensed to practice medicine)

CALIF. 1-9382

INSTRUCTIONS FOR EXECUTING APPLICATION FOR U. S. GOVERNMENT LIFE INSURANCE.

Applications should be completed in ink, or type-written except as to signature of applicant. Write Plainly.

If more than one kind of insurance is desired, a separate application should be submitted for each plan of insurance applied for.

1. Name of Applicant.—Your complete name is necessary. For example, do not state the name as "J. P. Jones," "John P. Jones," or "J. Paul Jones," but as "John Paul Jones."

2 Residence.—Your home address should be fully stated. If you live in a large city, state the complete name of the street, avenue, boulevard, or place, and give the house number. If you live in a town or village, give only the name of the town or village post office from which you receive your mail, and rural route number, if any.

9. Total Disability Benefits.—In accordance with the provisions of Section 311 of the World War Veterans' Act, as amended May 29, 1928, an insured is eligible to apply for total disability benefits, payable in the event he is totally disabled for a period of twelve consecutive months. This benefit is independent of and in addition to the disability benefits provided in the insurance contract, and is granted only to those in good health upon proper

application and the payment of the additional premium necessary to cover the benefits.

11. Beneficiary.—The insured under a United States Government life-insurance policy may designate any person, firm, corporation, or legal entity as beneficiary under the policy either individually or as trustee. You should write the name or names of beneficiaries in full. Do not state the name to be “Mrs. John Paul Jones,” but state as “Mary Jane Jones.” You should also state what relation the beneficiary is to you.

12. Optional Settlements.—The insured may select any one of the following three options for payment of insurance benefits upon his death:

Option 1. Insurance payable in one sum.—Settlement under this option will be made only when selected by the insured during his lifetime or by his last will and testament. When such selection has been made the face amount will be payable in one sum at the maturity of the policy by death.

Option 2. Insurance payable in limited installments.—The installments noted below will be payable for an agreed number of months (not less than 36) to the designated beneficiary, but if such beneficiary dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions of the policy.

Number of monthly installments	Amount of installment for each \$1,000 of insurance	Number of monthly installments	Amount of installment for each \$1,000 of insurance
36.....	\$29.19	144.....	\$8.46
48.....	22.27	156.....	7.94
60.....	18.12	168.....	7.49
72.....	15.35	180.....	7.10
84.....	13.38	192.....	6.76
96.....	11.90	204.....	6.47
108.....	10.75	216.....	6.20
120.....	9.83	228.....	5.97
132.....	9.09	240.....	5.75

Note.—If this option is selected, the applicant should be careful to insert in the blank space the correct number of monthly installments desired.

Option 3. Insurance payable in installments throughout life.—The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before 240 such installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions of the policy.

Age of beneficiary at time of death of insured	Amount of installment for each \$1,000 of insurance	Age of beneficiary at time of death of insured	Amount of installment for each \$1,000 of insurance
10.....	\$3.67	45.....	\$4.79
15.....	3.75	50.....	5.07
20.....	3.84	55.....	5.35
25.....	3.96	60.....	5.56
30.....	4.11	65.....	5.70
35.....	4.30	70.....	5.75
40.....	4.52	75.....	5.75

Amounts of monthly installments for other ages will be furnished upon request.

[Endorsed]: Gov. Exhibit A ident. Filed 5/27, 1941. By Cross, Deputy Clerk. (Later into evidence).

The Court: Will you tell the jury first what this document is?

Mr. Dillon: It is an application to the United States Government for life insurance signed by Thomas Joseph Kelley the 15th day of March, 1932.

(Reading exhibit.)

Mr. Hoffman: May I interrupt just a minute, Mr. Dillon. As to the rest of the application, would it be stipulated that the evidence may go in subject to a motion to strike later if it is not connected up? In other words, unless the Government later can prove that the statements that were made are material or that they were false or untrue, they would be incompetent, irrelevant and immaterial in the trial of this case. Rather than interrupting counsel's reading of the questions and answers I just want him to stipulate that the evidence may go in subject to a proper [7] motion to strike if such motion may be made.

Mr. Dillon: I haven't anything to do about making motions; but we don't stipulate in respect to anything, just because this is over the signature of

the man himself, and we want to show the entire background of the application which is necessary.

The Court: As I understand, Mr. Hoffman, the Government's Exhibit A is merely the application of Mr. Kelley for insurance.

Mr. Hoffman: That is right, your Honor.

The Court: The questions and answers that he made at that time; but the falsity is not before the jury at this time.

Mr. Hoffman: That is right.

The Court: That will have to come up later, at which time, of course, any objection that you care to make will be in the record and ruled upon by the Court.

Mr. Hoffman: I just want to reserve my objection until some later time.

Mr. Dillon: (Continuing to read Government's Exhibit A.)

Mr. Dillon: At this time the Government will offer this document as Government's next exhibit for identification.

The Clerk: B. [8]

(The document so offered was marked Government's Exhibit B for identification.)

Mr. Dillon: Government offers in evidence at this time Government's Exhibit B, standard certificate of death.

Mr. Hoffman: To which we object, your Honor, upon a number of grounds. First, it is incompetent, irrelevant and immaterial what the insured died of.

It doesn't matter what he died of. The question in this case is, Did he, a number of years before his death, make a false statement of fact that he knew was false when he made it. Now it doesn't make any difference what he died of or whether or not he died of a disease that he had at the time. The question is, Did he know he had the disease, and thereafter did he falsely deny that he did have it.

It is objected to on the further ground, your Honor, that it has been stipulated in this case that he died. Therefore, it would be merely cumulative in establishing the fact of death. The cause of death, I submit, your Honor, is immaterial.

The Court: It will be admitted in evidence.

WRITE PLAINLY WITH UNFADING BLACK INK—THIS IS A PERMANENT RECORD

Give item of information should be carefully supplied. AGE should be stated exactly. If unknown, give approximate age. Physicians should state CAUSE OF DEATH in plain terms, so that it may be properly classified. Exact statement of OCCUPATION is very important.

STATE OF CALIFORNIA DEPARTMENT OF PUBLIC HEALTH VITAL STATISTICS									
STANDARD CERTIFICATE OF DEATH									
1. PLACE OF DEATH: <u>Los Angeles</u>		COUNTY OF <u>Los Angeles</u>		LOCAL REGISTERED NO. <u>344</u>					
2. FULL NAME: <u>Thomas J. Kelley</u>		RESIDENCE: <u>1172 Western Ave.</u>		STREET AND NO. <u>Hospital, Vet. Adm. Facility</u>		IF DEATH OCCURRED IN A HOSPITAL OR INSTITUTION, GIVE ITS NAME INSTEAD OF STREET AND NO.			
3. SEX: <u>Male</u>		4. COLOR OR RACE: <u>White</u>		5. SINGLE, MARRIED, WIDOWED OR DIVORCED: <u>Married</u>		22. DATE OF DEATH: <u>Aug. 10th 1935</u>			
6. DATE OF BIRTH: <u>Sept. 23rd 1898</u>		7. AGE: <u>36</u> YRS. <u>8</u> MO. <u>17</u> DAYS		8. TRADE, PROFESSION OR KIND OF WORK DONE: <u>Engineer</u>		23. MEDICAL CERTIFICATE OF DEATH			
9. INDUSTRY OR BUSINESS IN WHICH WORKED: <u>Steam Railroad</u>		10. DATE DECEASED LAST WORKED: <u>Unk</u>		11. TOTAL YEARS SPENT IN THIS OCCUPATION: <u>Unk</u>		I HEREBY CERTIFY THAT I HAVE MADE DECEASED FROM <u>Aug. 1-1935</u> TO: <u>Aug. 10-1935</u> THAT I LAST SAW HIM ALIVE ON <u>Aug. 10-1935</u> AND THAT DEATH OCCURRED ON THE ABOVE STATED DATE AT THE HOUR OF <u>1:30</u> A. M. THE PRINCIPAL CAUSE OF DEATH AND RELATED CAUSES OF IMPORTANCE, IN ORDER OF ONSET, WERE AS FOLLOWS: <u>Aneurysm of the aortic arch lacerated</u> <u>with compression of trachea</u>			
12. BIRTHPLACE (CITY OR TOWN): <u>Unk</u>		13. NAME: <u>J.J. Kelley</u>		14. BIRTHPLACE (CITY OR TOWN): <u>Unk</u>		24. CORONER'S CERTIFICATE OF DEATH			
15. STATE OR COUNTRY: <u>Ireland</u>		16. MAIDEN NAME: <u>Unk</u>		17. BIRTHPLACE (CITY OR TOWN): <u>Ireland</u>		I HEREBY CERTIFY THAT I TOOK CHARGE OF THE REMAINS DESCRIBED ABOVE, HELD THEREON, AND FROM SUCH ACTION FIND THAT SAID DECEASED CAME TO HIS DEATH ON THE DATE STATED ABOVE.			
18. INFORMANT (SIGNATURE): <u>Records of Veterans Administration Facility</u>		19. BURIAL, CREMATION OR REMOVAL: <u>Removal</u>		20. EMBALMER (SIGNATURE): <u>L. Simpson</u>		OTHER CONTRIBUTORY CAUSES OF IMPORTANCE			
21. FILED: <u>Aug. 10-1935</u>		22. SIGNATURE: <u>Veterans Administration Facility</u>		23. WHEN REQUIRED BY LAW: <u>Unk</u>		DATE OF ONSET: <u>10 Days</u>			
						IF OPERATION, DATE OF: <u>None</u> WAS THERE AN AUTOPSY? <u>Yes</u>			
						CONDITION FOR WHICH PERFORMED: <u>None</u>			
						NAME LABORATORY TEST CONTAINING DIAGNOSIS: <u>None</u>			
						25. IF DEATH WAS DUE TO EXTERNAL CAUSE (VIOLENCE) FILL IN THE FOLLOWING.			
						ACCIDENT, SUICIDE OR HOMICIDE? <u>None</u> DATE OF INJURY: <u>None</u>			
						INJURED AT: <u>City or Town of</u> COUNTY AND STATE OF: <u>None</u>			
						DID INJURY OCCUR IN HOME, INDUSTRY, OR PUBLIC PLACE? <u>None</u>			
						MANNER OF INJURY: <u>None</u>			
						NATURE OF INJURY: <u>None</u>			
						26. IF DISEASE/INJURY RELATED TO OCCUPATION SPECIFY: <u>None</u>			
						27. SIGNATURE: <u>Veterans Administration Facility</u>			
						ADDRESS: <u>Unk</u>			
						28. WHEN REQUIRED BY LAW: <u>Unk</u>			
						COUNTRY OF: <u>Unk</u>			

EXAMPLE I

The principal cause of death and related causes of importance were as follows:

ricketsclerosis
chronic interstitial nephritis
cerebral hemorrhage

Other contributory causes of importance: 252 11000

A
California
1935-1936
California State Population

Date of onset

1915
1921
July 5, 1927

May 1, 1928

The principal cause of death and related causes of importance were as follows:

Attack of epilepsy

Run over by street car

Peritonitis

Other contributory causes of importance:

Gastroenteritis

Date of onset

1 week ago
1 week ago
3 days ago

1 year

EXAMPLE II

(Peter this is bad to be taken from the 11000)

Mr. Hoffman: May we have an exception?

The Court: Exception noted.

Mr. Dillon: May I read a certain portion?

The Court: Yes.

Mr. Dillon: (Reading Government's Exhibit B.)

As the dates of the application and of the denial have [9] been stipulated to, I desire to have marked as an exhibit a letter of August 29, 1935.

The Clerk: Defendant's Exhibit C for identification.

(The document referred to was marked Defendant's Exhibit C for identification.)

Mr. Dillon: Defendant offers at this time Defendant's Exhibit C.

Mr. Hoffman: To which we object, your Honor. We have stipulated that they have disagreed with the Plaintiff, and the effect of this letter would merely be to set forth the reasons why, which are immaterial. Whether the reasons were good or bad is not in issue in this case. They have disagreed with Plaintiff, and to read this communication, which I would like the Court to look at, would not add anything except to give the reasons that the particular writer of the letter had. Then we object to it on the further ground that no proper foundation has been laid. The production of the original letter has not been demanded, and you can't offer a copy without notice to produce the original.

Mr. Dillon: The second ground is undoubtedly true. I could take the stand and testify that I took

it from the files of the Veterans' Administration myself.

Mr. Hoffman: I will withdraw my second objection. I know the Government doesn't produce carbon copies of letters they don't send. I would reasonably believe the original was received. I haven't got it because it was addressed to a man [10] in Washington, D. C.

Mr. Dillon: Copy was sent to Mrs. Kelley.

Mr. Hoffman: I don't think it is admissible in view of the stipulation we have entered into admitting the fact of disagreement.

Mr. Dillon: The purpose of the letter is—it is the usual letter of disagreement and shows the grounds on which the Government refused to pay the claim under this insurance.

The Court: The Plaintiff in her complaint, Paragraph VI, states that a disagreement exists between the Plaintiff and the Defendant over the \$5,000 benefits. So I assume that this is part of that denial.

Mr. Hoffman: That is right.

The Court: And also part of the issue there. On that ground it will be admitted.

DEFENDANT'S EXHIBIT C

August, 29, 1935

FCB

Kelley—Thomas J.
XC-1 783 258

Captain Watson B. Miller
Chairman, National Rehabilitation Committee
The American Legion
1608 K Street, N. W.
Washington, D. C.

My dear Captain Miller:

This will acknowledge receipt of your letters dated August 20th and August 23, 1935, forwarding evidence in support of the claim of Mrs. Rosetta Alice Kelley for adjusted compensation, insurance and pension in the case of the above named former service man.

Action will be taken to effect settlement of the claim of Mrs. Kelley for adjusted compensation benefits as soon as the loan record has been received from the office of this Administration, Los Angeles, California.

With reference to insurance you are informed that while the veteran was in the service he was granted yearly renewable term insurance in the amount of \$10,000, on which premiums were paid through the month of January, 1919. On March 15, 1932, the veteran applied for \$5,000 insurance. In his application the veteran stated that he was in good health; that he was not treated for diseases

enumerated on the application, including heart and blood vessels, and that he never had rheumatism or heart disease. This Administration relying on the statements made by the veteran issued policy K-919,427, in the amount of \$5,000. In his application for compensation the veteran stated that he was suffering from rheumatism, heart and spine trouble during December, 1919.

Therefore, it appears that the veteran withheld information material to insurability at the time that he applied for his insurance. Accordingly, it will be necessary to cancel policy K-919,427 on account of the fraudulent misrepresentations made by the insured and the claim of Mrs. Rosetta Alice Kelley for insurance benefits must be disallowed.

Information regarding the claim for pension will be furnished in a separate communication.

Respectfully,

H. L. McCOY,

Director of Insurance.

[Endorsed]: Deft Exhibit No. C ident. Filed 5/27, 1941. By Cross, Deputy Clerk. (Later admitted)

Mr. Dillon: May I read certain portions, your Honor?

(Reading exhibit.)

The Court: I think we will take our morning recess.

(At this point a short recess was taken, after which proceedings were resumed, as follows:)

Mr. Hoffman: May I ask that the jury at this time be instructed that the contents of the letter are not proof of any fact, but that the letter was read merely to show the reason the Government didn't want to pay it, and not as evidence of the truth or falsity of any facts set forth in [11] the letter.

Mr. Dillon: I agree.

The Court: Counsel's statement is correct, and the jury will be so instructed.

Mr. Dillon: I offer this for identification as Defendant's Exhibit next in order.

The Clerk: Defendant's Exhibit D.

(The document referred to was marked Defendant's Exhibit D for identification.)

Mr. Dillon: Defendant offers in evidence Defendant's Exhibit D.

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

DEFENDANT'S EXHIBIT D

January 8, 1936

FCB

Kelley—Thomas J.

XC-1 783 258

Mrs. Rosetta Alice Kelley
1172 Western Avenue
San Bernardino
California.

Dear Madam:

Receipt is acknowledged of your letter dated January 2, 1936, requesting that you be advised as to the action taken on the claim which you submitted for the insurance benefits under policy K-919427.

For your information we are inclosing herewith a copy of a letter which was forwarded to the National Rehabilitation Committee of the American Legion under date of August 29, 1935, concerning this claim.

Respectfully,

H. L. McCOY,

Director of Insurance.

Incl.

Copy of Letter

8-29-35

JEG:GT

[Endorsed]: Deft. Exhibit No. D ident. Filed
5/27, 1942. By Cross, Deputy Clerk.

Mr. Hoffman: We will stipulate, your Honor, that Mrs. Kelley got a copy of the letter that was sent to the American Legion. That was Defendant's Exhibit C.

Mr. Dillon: I offer this to be marked for identification.

The Clerk: Defendant's E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

Mr. Dillon: Defendant offers in evidence Defendant's Exhibit E.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

DEFENDANT'S EXHIBIT E

Application of Veteran

For Disability Allowance Under Section 200,

World War Veterans' Act, 1924

As Amended July 3, 1930

Name (Print clearly)—Kelley. Thomas Joseph.

Address—1172 Western Ave., San Bernardino, Calif.

I hereby apply for disability allowance under the provisions of Section 200 of the World War Veterans' Act, 1924, as amended July 3, 1930, and submit the following facts as evidence that I am eligible for that allowance.

1. (a) Place of birth—Crystal Lake, Colorado.

(b) Date of birth—Sept. 23, 1892.

2. Description of applicant as of date of this application:

Sex—Male Race—White Weight—116
pounds. Height 60½ inches. Color of
hair—Brown Color of eyes—Blue Com-
plexion—Medium.

3. Make a cross (x) after branches of service you served in:

Army x, Navy....., Marine Corps.....,
Coast Guard.....

4. Give dates of enlistment and discharge for each period or periods of service during the World War, commencing prior to November 11, 1918.

Enlisted,

Date—Sept. 19, 1917.

Place—Dillon, Mont.

Serial No. 2,253,294.

Discharged

Date—Jan. 16, 1919

Place—Camp Dodge, Ia.

Rank and organization—Cpl. Unassigned

Character of discharge—Honorable.

Note.—If during any of these enlistments you served under a name other than the one used in this application, state the name under which you served, the period of the enlistment, and full explanation.

5. (a) Have you ever applied for disability compensation?—No.

(b) When and where?.....

- (c) What is your Compensation Claim number?
- (d) Have you ever been physically examined for the United States Veterans Bureau?—No. (e) If so, give date and place of last examination.....
6. (a) Are you in receipt of retirement pay?—No.
- (b) Are you in receipt of reduced retirement pay?—No.
- (c) Are you in receipt of retainer pay?—No.
- (d) Are you in receipt of a pension?—No.
- (e) Are you in receipt of disability compensation?—No.
- (f) Are you in receipt of insurance benefits?—No.

7. Nature of disease or injury on account of which disability allowance is claimed—Rheumatism, Heart trouble, trouble with spine.

8. Give full name and complete address of nearest relative—Rosetta Allice Kelley, Wife. 1172 Western Ave. San Bernardino, Calif.

9. Have you ever been dishonorably discharged from any period of service in any branch of the military or naval service?—No. If answer is “Yes” state rank and organization at time of dishonorable discharge, and the date of the dishonorable discharge

10. (a) Are you employed?—Yes.
(b) What is your regular trade or vocation?
—Loco. Fireman, U. P. RR.
11. (a) Did you file a Federal income tax return
for the last year?—No.
(b) Where?
(c) Were you exempted from payment of an
income tax?—Did not earn enough.
(d) If so, why?—Did not earn \$3500.00.

I Hereby Certify that answers to all questions are true and complete to the best of my knowledge and belief. (Note sections of law printed on reverse side of form.)

THOMAS J. KELLEY.

Subscribed and Sworn to before me this 31st day of August, 1931, by Thomas J. Kelley, claimant, to whom the statements herein were fully made known and explained.

(Seal)

R. A. WICKIJER,

Notary Public.

My Commission Expires March 11, 1935.

Quotations from the World War Veterans' Act,
1924, As Amended July 3, 1930

Title I, Second Paragraph, Section 200.—“On and after the date of the approval of this amendatory Act any honorably discharged ex-service man who entered the service prior to November 11, 1918, and served ninety days or more during the World

War, and who is or may hereafter be suffering from a 25 per centum or more permanent disability, as defined by the director, not the result of his own willful misconduct, which was not acquired in the service during the World War, or for which compensation is not payable, shall be entitled to receive a disability allowance at the following rates: 25 per centum permanent disability, \$12 per month; 50 per centum permanent disability, \$18 per month; 75 per centum permanent disability, \$24 per month; total permanent disability, \$40 per month. No disability allowance payable under this paragraph shall commence prior to the date of the passage of this amendatory Act or the date of application therefor, and such application shall be in such form as the director may prescribe; Provided, That no disability allowance under this paragraph shall be payable to any person not entitled to exemption from the payment of a Federal income tax for the year preceding the filing of application for such disability allowance under this paragraph. In any case in which the amount of compensation hereafter payable to any person for permanent disability under the provisions of this Act is less than the maximum amount of the disability allowance payable for a corresponding degree of disability under the provisions of this paragraph, then such person may receive such disability allowance in lieu of compensation. Nothing in this paragraph shall be construed to allow the payment to any person of both a dis-

ability allowance and compensation during the same period; and all payments made to any person for a period covered by a new or increased award of disability allowance or compensation shall be deducted from the amount payable under such new or increased award. As used in Titles I and V of the World War Veterans' Act, 1924, as amended, the term "compensation" shall be deemed to include the term "disability allowance" as used in this paragraph."

Attorney Fees

Title V, Section 500.—"Except in the event of legal proceedings under section 19 of Title I of this Act, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Titles II, III, and IV of this Act, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed \$10 in any one case."

Penalty

Title V, Section 501.—"That whoever in any claim for compensation, insurance, or maintenance and support allowance, or in any document required by this

Act, or by regulation made under this Act, makes any sworn statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

[Endorsed]: Deft. Exhibit No. E ident. Filed 5/27, 1942. By Cross, Deputy Clerk. (Later into evidence.)

Mr. Dillon: May I read certain portions? [12]

Mr. Hoffman: May I reserve my objections, your Honor, the same as to the other exhibits, along the same line?

The Court: Yes.

Mr. Dillon: This is the application of the veteran for disability allowance under Section 200 of the World War Veterans Act of 1924 as amended July 3, 1930.

(Reading exhibit.)

Mr. Dillon: Mark this for identification.

The Clerk: Defendant's Exhibit F for identification.

(The document referred to was received and marked Defendant's Exhibit F for identification.)

Mr. Dillon: Defendant offers in evidence Defendant's Exhibit F.

(The document referred to was received in evidence and marked Defendant's Exhibit F.)

DEFENDANT'S EXHIBIT F

C-.....

L. A. 20289

Application for Compensation of Veteran Disabled
in the World War

All papers submitted with reference to this claim should bear your full name, also your rank and organization at discharge.

You must furnish the information required in this application, and every question must be answered fully and clearly. Answers must be written in a clear, readable hand, or typewritten. If you do not know the answer to any question, say so.

Forward a certified copy of your certificate of discharge from the service in the World War with this application.

1. Full name—Kelley, Thomas Joseph.

2. Address—1172 Western Ave. San Bernardino, Calif.

A. Military Experience and Related Information

3. Under what name did you serve in the World War?—Thomas J. Kelley.

4. Color—White. Date of birth—Sept. 23, 1892. Place of birth—Crystal Lake, Colo.

5. Date of entering service in the World War—Sept. 19, 1917. Place of entry—Dillon, Mont. Date of discharge from World War service—Jan. 16, 1919. Place of discharge—Camp Dodge, Ia.

6. Company and regiment or organization, vessel

on which, or station in which you served during the World War—Co. B. 346th M.G. Bn.

7. Rank or rating and organization at time of discharge—Cpl. Unassigned, Co. 2, 163, D.Br.

8. Nature of discharge: Honorable—Honorable, ordinary.....; dishonorable.....; bad conduct.....; S. C. D.....

9. Make a cross (x) after branches of service you served in: Army x; Navy.....; Marine Corps.....; Coast Guard.....

(a) Give serial No.—2,255,294.

(b) Were you accepted for general or limited service?—General.

10. State all other period of military or naval service, if any.....

11. Nature of disability claimed—Rheumatism, Heart trouble. Date disability began—Oct. and Nov. 1918.

12. Cause of disability—Spine not known. Where received—in Army service.

13. If you received treatment while in the service give the name, number or location of the hospital, first-aid station, dressing station, or infirmary, or the organization to which it was attached, the dates of treatment, and the nature of sickness, disease, or injury—Base Hospital 48.

(a) Names and addresses of all civilian physicians who have treated you for any sickness, disease, or injury since the beginning of your service in the World War:

Name—Dr. F. P. King D. C.

Present address—Chamber of Commerce Bldg.

Disability—Spinal adjustments.

Date—9-30—Mar. 31.

(b) Names and addresses of all persons other than physicians who know any facts about any sickness, disease, or injury which you have had in active service or since discharge from the World War:

Name—F. W. Rathos.

Address—Pocatello, Ida. c/o Union Pac. RR.

Disability—Heart & Spine trouble, Rheumatism.

Date—Dec., 1919.

(c) Give the names and addresses of employers, monthly wages or salary, occupation or vocation pursued, and periods of time employed since discharged from military service, in the World War. If self-employed for any periods, so state.

Employer—O S L RR.

Address—Pocatello, Ida.

Wages or salary—\$140.00 mo.

Occupation—Brakeman Page.

Period of time employed—Mar. 1919-Dec. 1919.

Employer—Union Pacific R.R.

Address—Los Angeles, Cal.

Wages or salary—\$150.00-200.00 per mo.

Occupation—Loco. Fireman.

Period of time employed—May 1920-present.

14. Are you willing to accept hospital, medical, or surgical treatment?—Yes.

15. If the sickness, disease, or injury was caused through the fault of some person other than the United States or the enemy, state whether suit has been commenced against or settlement made with such person on account of such injury.....

If settlement has been made or damages recovered, state which and the amount.....

B. Pre-Enlistment Occupational History

16. Give the names and addresses of employers, and your monthly earnings for the 24 months preceding your enlistment for service in the World War. If self-employed, so state.

Employer—L. A. & S. L. RR.

Address—Los Angeles.

Occupation—Fireman.

Duties performed—Loco. Fireman.

Dates—6. 1913, 8. 1916.

Employer—B.&C. RR.

Address—Magna, Utah.

Occupation—Fireman.

Duties Performed—Loco. Fireman.

Dates—9. 1916, 4. 1917.

Employer—O.S.L. RR.

Address—Pocatello, Ida.

Occupation—Trainman.

Duties performed—Trainman.

Dates—4. 1917, 9. 1917.

C. Family Obligations and Dependency Claims

17. Are you single, married, widowed, or divorced?—Married.

18. Times married—One. Date and place of last marriage—San Bernardino, Cal. Nov. 4, 1922.

19. Times present wife has been married—Twice. Maiden name—Rosetta Alice Kemmer.

20. Do you live together?—Yes. (a) If not, state reason, and your wife's present address.....

21. Have you any child or children living, including adopted children, stepchildren, and illegitimate children, under 18 years of age and unmarried, or any child of any age who is insane, idiotic, or otherwise permanently helpless? If so, give the following particulars about each child: No.

22. (a) Is your mother now dependent on you for support?—Deceased.

(b) Is your father now dependent on you for support?—No.

D. Miscellaneous Information

23. Did you make an allotment of your pay while in the service?—Yes. \$20.00.

24. If so, to whom?—My Father.

25. Have you ever filed any other claim for compensation on account of any disability?—No.

(a) Give C-Number assigned.....

(b) If so, state the address of the office in which the claim was filed.....

(c) Are you now receiving payments of compensation?—No.

(d) Did you ever receive payments of compensation?—No.

26. Did you every apply for War Risk Insurance?—No.

(a) Give T or K Number.....

27. Have you made claim for Adjusted Compensation (Bonus)? (Yes or No.)—Yes.

28. Are you now drawing naval fleet reserve, retirement, or service pay?—No.

(a) If so, from what date and in what monthly amount?

29. Have you ever applied for a pension to the Bureau of Pensions, Department of the Interior?—No.

(a) If so, give pension claim number.....

(b) Have you ever received payments on a pension claim?—No.

(c) Are you now receiving payments on a pension?—No.

(d) If so, in what sum monthly?.....

I Hereby Certify that answers to all questions are true and complete to the best of my knowledge and belief. I make the foregoing statements as a part of this application with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

THOMAS J. KELLEY.

Subscribed and sworn to before me this 31st day of August, 1931, by Thomas J. Kelley, claimant, to whom the statements herein were fully made known and explained.

(Seal)

R. A. WICKIZER,
Notary Public.

My Commission Expires March 11, 1935.

Penalty

That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this Act, or by regulations made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both (Sec. 501, W. W. V. A., 1924).

[Endorsed]: Deft Exhibit No. F ident. Filed 5/27, 1941. By Cross, Deputy Clerk. Later into evidence.

Mr. Hoffman: May we reserve our objection?

The Court: So understood.

Mr. Dillon: This is the application for compensation to a veteran disabled in the World War, dated the 31st of August, 1931, signed by Thomas J. Kelley.

May I read certain portions, your Honor?

The Court: Yes.

Mr. Dillon: (Reading exhibit.)

Mr. Dillon: Government offers this for identification.

The Clerk: Government's Exhibit G for identification. [13]

(The document referred to was marked Government's Exhibit G for identification.)

Mr. Dillon: Government offers in evidence Defendant's Exhibit G.

Mr. Hoffman: May we reserve our objections, your Honor, except as to a certain report that is on white paper appended thereto. If you will hand it up to the Court, Mr. Dillon, I can point out to the Court my objection to that portion of the document. My objection may be a little premature because counsel may be able to furnish the proof; but at this time my objection is based on the grounds that the person who made the laboratory report has not been called as a witness. That is true also as to X-ray pictures, as differentiated from the report of the doctor himself. The Ninth Circuit has passed on this question in the case of U. S. V. Le Fevre, 72 Fed. (2d), page 827; and I submit, your Honor, that the rule that permits the medical examinations made—without admitting that that is admissible and reserving my objections to the whole exhibit—but if the rest of it were admissible, I submit that these reports by technicians that on their face don't show that they are doctors, are not proper unless a proper foundation is laid, and I object on that ground.

Mr. Dillon: I don't get the grounds for the objection.

Mr. Hoffman: I will stipulate that it is part of the Veterans' Administration's files because it is clipped to or [14] appended to a medical report. My position is that it is not admissible unless you produce the technician that made the examination.

Mr. Dillon: I will be glad to do that. I will withdraw it at this time.

At this time, your Honor, there is a deposition on file on behalf of the Defendant that I should like to read.

(Reading of deposition of

RICHARD B. POSEY.)

* * *

"Q. Subsequent to July 2, 1927, what was necessary for a man to secure a policy of United States Government Life Insurance, his policy having previously lapsed after his discharge from the military service?"

Mr. Hoffman: That is objected to as calling for a conclusion of the witness. Section 512(a) of Title 38, the United States Code, which is known as Section 310 of the World War Veterans Act, as amended, provides expressly what is necessary for a man to get a converted policy, as follows: (reading section.)

Mr. Dillon: I will withdraw the question, your Honor. Counsel's explanation is more full than the answer.

(Deposition of Richard B. Posey.)

The Court: Yes, the statute covers it.

Mr. Dillon (Continuing to read deposition of Richard B. Posey):

“Q. Mr. Posey, under the procedure of the Veterans’ Administration, when a man applies for compensation what [15] office is that application for compensation filed in?

“A. Usually the Regional Office or facility in the field.

“Q. Now, assuming that a man was a resident, at the time he applied for compensation, of California, where would the application be sent?”

Mr. Hoffman: Your Honor, I object to both of those questions on the ground that it is immaterial what is usually done. The question is, What was done in this case. The practice has certainly nothing to do with whether or not the man did or did not do something. The question is, what Kelley did, not ordinarily what is done.

The Court: Is there some dispute here about the issuance of the policy on the part of the Government?

Mr. Dillon: No, your Honor. The question here is to show that his application for compensation which I read was made here in Los Angeles and not in Washington. The insurance is handled in Washington. The compensation is handled in Los Angeles. Therefore we want to establish, apparently by this question, that it was made in Los Angeles.

(Deposition of Richard B. Posey.)

Mr. Hoffman: We further object on the ground that the two applications introduced are the best evidence as to where they were filed, and they speak for themselves. This witness hasn't shown he knows anything about it.

Mr. Dillon: I will withdraw the question.

"Q. Would the Insurance Service of the central office [16] have any knowledge as to this application for compensation?

"A. They would eventually get the number, C number assigned in that case, but they might not receive the files for a long period of time. They might remain in the field indefinitely."

Mr. Hoffman: I move to strike that portion of the answer that reads,

"But they might not receive the files for a long period of time; they might remain in the field indefinitely."

The Court: It will be stricken out.

Mr. Dillon: (Continuing reading of deposition.)

"Q. Mr. Posey, what is the generally accepted definition of good health?"

Mr. Hoffman: I object to that, your Honor, on two grounds; first, it is a conclusion of law, the proper conclusion of this Court.

Mr. Dillon: He reframes the question. We will see how he reframes it.

(Deposition of Richard B. Posey.)

“Q. Mr. Posey, what is the generally accepted definition of good health, as interpreted by the Insurance Service of the Veterans’ Administration?”

Mr. Hoffman: That is objected to. In the first place, there is nothing to show that Mr. Kelley in San Bernardino had the slightest idea what the accepted meaning was by the Insurance Division; secondly, the law provides that he has to be in good health, and it is for your Honor to determine [17] and instruct the jury what is meant by the terms of the policy, not some fellows sitting back in Washington, unless it can be shown that that definition was communicated to the insured when he made his application and got his insurance.

(Argument)

Mr. Dillon: Well, strike the question.

“Q. And then, under the regulations or procedure of the Veterans’ Administration, before a man would be entitled to have United States Government life insurance granted to him subsequently to July 2, 1927, under the provisions of Section 310 he would have had to have been free from injury or disease at the time the insurance was granted.”

Mr. Dillon: The objection is that the question was leading.

Mr. Hoffman: I will make the objections, if

(Deposition of Richard B. Posey.)

needed, to save time. I have no objection to the form of the question.

Mr. Dillon: (Continuing reading of deposition.)

“A. He would have had to have been in good health.”

The Court: We will take our recess until 2:00 o'clock.

(Thereupon at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same date.) [18]

Los Angeles, California

Tuesday, May 27, 1941

2:00 o'clock P. M.

The Court: You were reading the deposition of Mr. Posey, I believe, were you not, Mr. Dillon?

Mr. Dillon: Yes, your Honor.

The Court: Proceed.

Mr. Dillon (Continuing reading of deposition of Richard B. Posey):

“Q. Mr. Posey, I hand you this application and ask if the application contains a question relative to the filing of a claim for compensation.”

Mr. Hoffman: That is objected to, your Honor, on the grounds that the application speaks for itself and is the best evidence. It has been read here.

The Court: Objection overruled.

(Deposition of Richard B. Posey.)

Mr. Dillon (Continuing reading of deposition):

“A. It does have such a question.

“Q. Would you read into the record the question and the answer of the applicant for insurance to that question?”

Mr. Hoffman: Same objection, your Honor, on the grounds that it is just repetition, cumulative evidence.

The Court: Overruled.

Mr. Dillon (Continuing reading of deposition):

* * * “Q. Mr. Posey, assuming that as a fact the applicant [19] for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service, under its practice and procedure, have made further inquiry before this insurance was granted, to determine what if any disability that claim was based upon?

Mr. Hoffman: I will read the objection that was made at the time, your Honor, and now adopt it as our objection:

“I object for the reason that the question is vague, indefinite, and uncertain; for the further reason that this witness was not engaged in work at the time that the alleged application, which is marked Defendant’s Exhibit No. 1, was acted upon; and that the question asks for hearsay testimony because of the fact that

(Deposition of Richard B. Posey.)

this witness is being asked what someone else would have done or would not have done so far as making inquiry is concerned; and that it is impossible for this witness to state what someone else would have done or would not have done, as asked in the question. All he can give is his idea of what somebody else might or might not do."

I add also the objection that it is hearsay and calls for the conclusion of the witness.

The Court: Sustained.

Mr. Dillon: I rephrase the question as follows:

"Q. Mr. Posey, assuming that as a fact the applicant for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service have been [20] required, under its practice and procedure, to make further inquiry before this insurance was granted, to determine what, if any, disability that claim was based upon?

Mr. Hoffman: Same objection as before, with the added objection, your Honor, that testimony regarding a custom and usage of the insurance carrier, insurance company, is inadmissible unless it can be shown that the insured knew the custom that the witness is about to relate.

The Court: Sustained.

Mr. Dillon: That isn't the purpose of this question, if your Honor please. The purpose of the

(Deposition of Richard B. Posey.)

question is, What was the practice of the Insurance Department of the Veterans Administration in respect to an application for insurance, whether it was the custom and the practice and the regulations of the Insurance Department to make further investigation under this type of insurance, or to accept the application on its face value. I think that is competent.

The Court: Suppose the custom were established, Mr. Dillon, and then not followed.

Mr. Dillon: Well, in this case, you see, the custom was that they did not. If it wasn't followed, why, it would be entirely different. It would mean that they did look into other things.

Mr. Hoffman: It would appear to me also, your Honor, that no proper foundation has been laid for this witness to testify as to whether they did or didn't look in this particular case. It is not a question of custom; it is, Did they in this instance make any investigation.

The Court: Sustained.

Mr. Dillon: (Continuing reading of deposition)

* * *

"Q. Mr. Posey, if it is shown by the records and on the trial of this case that this insured was examined on October 28, 1931, and at that time was diagnosed as suffering from 'aortitis, chronic mild, with good cardiac tolerance,' and had he made that known to the Veterans' Administration in this application for insurance in

(Deposition of Richard B. Posey.)

1932, would this insurance, under the regulations and procedure of the Veterans' Administration, have been granted?"

Mr. Hoffman: That is objected to on a number of grounds, one of which is that there is no testimony as to what regulations or procedure they are talking about; secondly, there is no showing that the witness is qualified as an expert or is a person who would pass upon or ever did pass upon a single application for insurance, and it is asking for the witness to give his conclusion as to what somebody else might or might not have done, without laying any proper foundation therefor. There is no showing that this witness ever in his life passed on an insurance application.

The Court: That is a matter of cross examination. Overrule the objection.

Mr. Dillon: (Continuing reading of deposition)

[22]

"Q. Or could it have been granted, under the regulation and procedure of the Veterans' Administration."

Mr. Hoffman: I object to that, as to the question of whether it could have been granted, on the grounds set forth, and also that the application shows on its face that it was granted, and the person that granted it or didn't grant it hasn't been

(Deposition of Richard B. Posey.)

produced, and the rules and regulations haven't been produced.

(Argument)

The Court: I think it is a question for the jury. Sustain the objection.

Mr. Dillon (Continuing reading of deposition):

* * *

“Q. Under the regulation and procedure of the Veterans' Administration can a man who is shown to have had a positive Wassermann be granted insurance?”

Mr. Hoffman: That is objected to, your Honor. In the first place, no proper foundation has been laid; in the second place, it calls for a conclusion of the witness; in the third place, it is hearsay, and there is no foundation showing that the witness is qualified; it is highly speculative to say, “Could it have been done?”

Mr. Dillon: The man is testifying as an expert on insurance matters and regulations in the Veterans' Administration.

Mr. Hoffman: I submit he didn't say anything about [23] that. He just said he advises the Insurance Section. He doesn't say about what. He didn't say that he knew anything about the rules and regulations. I submit, your Honor, it doesn't matter, as far as this Plaintiff, the widow, is concerned, what the rules and regulations were.

The Court: The whole question of the case is whether or not the jury will find that the ap-

(Deposition of Richard B. Posey.)

plicant at the time misrepresented the condition of his health, whether he was in good health or not.

Mr. Hoffman: And whether something could have been done seems to me to be speculative.

The Court: Sustained.

Mr. Dillon (Continuing reading of deposition):

“Q. Mr. Posey, are the Veteran’s Administration Regulations and practice and procedure relative to the reinstatement or granting of insurance all in printed form, or have they been built up by custom?”

Mr. Hoffman: Same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

“A. We have regulations in printed form, but we also have practice that has grown up that is not in printed form.

“Q. And the practice as to the granting of insurance, is it or is it not almost entirely just a practice that has been built up and of which no printed regulations have been promulgated?”

[24]

Mr. Hoffman: I can’t see any materiality as to that, whether it has grown, or like Topsy——

The Court: Overruled.

Mr. Dillon (Continuing reading of deposition):

“A. The only regulation is the one that defines good health—I forget the number of that—but the practice has been to follow the

(Deposition of Richard B. Posey.)

authority in the law for the granting of insurance; and good health has been used to mean in the Bureau exactly what it says, that a man has no illness or disabilities.”

Mr. Hoffman: I object to that on a number of grounds. First, it is not in response to the question. Secondly, it is an invasion of the province of the Court; in other words, the witness is invading the province of the Court in instructing the jury and the province of the jury in determining the ultimate fact in this case. Furthermore, there is no showing that their definition, as argued this morning, as to what good health is, is binding on Mrs. Kelley, the surviving beneficiary, or on the insured; and for those reasons I move to strike from the answer, “and good health has been used to mean in the Bureau exactly what it says, that a man has no illness or disabilities;” on the further grounds that that is a conclusion of law by the witness. What is good health is something for your Honor to instruct the jury in this case and not for the witness, Mr. Posey.

The Court: I think this can be taken into consideration by the jury. He hasn’t attempted to pass on the ultimate question that this applicant was not in good health. He has given here a definition. I am inclined to say that that can be taken into consideration by the jury with whatever other instructions the Court feels the jury should be given

(Deposition of Richard B. Posey.)

in defining good health. I believe you stated to the Court this morning the definition of good health. It would be necessary for the Court to instruct the jury on that question.

Mr. Hoffman: Then if your Honor would instruct the jury, and your instruction would be different from Mr. Posey's idea, I assume that the jury would feel it was bound to follow the Court's definition and not Mr. Posey's definition.

The Court: The jury have already stated that they would all follow the instructions given by the Court.

Mr. Dillon: The instruction submitted is practically in the same language, incidentally.

(Continuing reading of deposition.)

"Q. Then, the practice is that if a man has any illness or disability, no insurance may be granted to him, under Section 310."

Mr. Hoffman: That is objected to on the same grounds; on the further ground that whatever the practice is, is immaterial and not binding on the insured or beneficiary, unless it can be shown that they knew about it. [26]

The Court: I think it is a self-serving declaration because the jury will be instructed that if they find that this man was not in good health, he was not entitled to the insurance.

Mr. Hoffman: One more thing: Not only that he was not in good health, but he knew it, because

(Deposition of Richard B. Posey.)

the test is not whether he was in good health, because the incontestability clause after six months says that only because of non-payment of premiums or fraud——

The Court: The defense here is fraud, of course.

Mr. Hoffman: Therefore, it wouldn't make any difference how sick he was, in fact, when he made out the application. The sole issue is, Did he make a fraudulent statement, to-wit, did he know that he was sick, and not, Was he sick?

Mr. Dillon: That isn't a correct statement of the law, but that will come up when the instructions are given.

The Court: Overruled.

Mr. Dillon (Continuing reading of deposition):

“A. There is no authority for granting the insurance, and any that is granted would be purely an error.”

Mr. Hoffman (Continuing reading of deposition of Richard B. Posey,

Cross Examination.)

* * *

“Q. Mr. Posey, a man's condition at the time of making application for insurance is the criterion which determines whether or not it shall be granted to him, isn't it? [27]

“A. I think the criterion is the condition the man is in when he applies, but in determining that condition it is a well known practice

(Deposition of Richard B. Posey.)

among the medical folks generally that the history of the man's life and what illnesses he has had plays a large part in determining that present condition."

Mr. Hoffman: I move to strike the portion about that it is a well known practice among medical folks generally. This witness has not shown, among all of his brilliant attainments, that he is a doctor and has any knowledge as to what the practice is among medical folks, even though, your Honor, he does advise the Marine Corps.

The Court: Motion granted.

Mr. Hoffman (Continuing reading of deposition):

"Q. Did you ever personally approve an application for reinstatement of insurance?

A. I don't believe I have, but I have been consulted on various times about the forms and what they should require and as to whether they ought to go into substandard business and take some of these folks, and we have discussed all of those things. Both of those doctors were calling on me for information."

Mr. Hoffman: Now, your Honor, I move to strike everything as not responsive, other than the words, "I don't believe I have." What he has been consulted about forms is not responsive to the question as to whether or not he ever approved an application for reinstatement of insurance. He [28]

(Deposition of Richard B. Posey.)

says he didn't. The rest of it is a voluntary statement of the witness.

The Court: It seems to me that is rather frivolous, but I will sustain the objection, or grant the motion.

Mr. Hoffman: (Continuing reading of deposition)

Mr. Dillon (Continuing reading of deposition of Richard B. Posey,

Redirect Examination):

“Q. Just one more question, Mr. Posey. Under the practice of the Veterans' Administration, had this insured at the time of his application stated that he was suffering from aortitis or had been suffering from aortitis and had in October, 1931, had a positive Wasserman, even with the examination of Dr. Lenker showing him to be a good risk and in good health at the time of his examination, could this insurance have been granted under the practice and procedure of the Veterans' Administration without further inquiry to determine his true condition?”

Mr. Hoffman: Objected to, your Honor, on the ground that no proper foundation has been laid; calling for the conclusion of the witness; no showing that this man—the fact is that a little earlier in this deposition, if your Honor will remember, when I was reading the cross, they asked him, “Did

(Deposition of Richard B. Posey.)

you ever approve an application for insurance?" He said, "No, I never did." How does he know, therefore, whether or not a person that approves applications for insurance would do it? It is speculative. [29]

Mr. Dillon: He is testifying merely as to the practices and procedures of the Veterans' Administration.

Mr. Hoffman: I submit, your Honor, he doesn't say he knows anything in that regard. He says he didn't pass on applications for insurance. It is just speculating, your Honor, as to what somebody else would or wouldn't do.

The Court: I think it is the question the jury will have to determine for us. I will sustain the objection.

Mr. Hoffman (Continuing reading of deposition, recross examination):

* * *

Mr. Hoffman: Attached to the deposition is the printed regulation, your Honor, the definition of good health, Section 3155: "The words 'good health' when used in connection with insurance"—I might say, your Honor, we are merely offering this for the limited purpose of showing that it wasn't adopted until May 17, 1934, and the insurance was granted in 1932, not for the purpose of showing that that was a valid or binding definition.

Mr. Dillon: That wasn't what it was introduced

(Deposition of Richard B. Posey.)

for. Your counsel asked him to get it. He said he would get it and attach it to the deposition, that it would be made a part thereof.

Mr. Hoffman: Let's go back, then. I asked him, Was there any regulation in effect on April 2, 1932, when application for insurance was made, defining good health? He [30] said he didn't know. Then he said he would produce the regulation that there was. Here it is: (reading "definition of good health" attached to deposition of Richard B. Posey.)

Mr. Hoffman: Now, your Honor, I move to strike the testimony of the witness Posey relating to the regulations as to good health for the reason that his own testimony shows that the only regulation that there was, was adopted subsequent to the issuance of the policy of insurance.

Mr. Dillon: It doesn't make any difference to me which way you rule, your Honor.

The Court: The Court will take care of that definition.

Mr. Hoffman: His testimony throughout the deposition was that, yes, they had a regulation, and this was it. Then he shows that it wasn't adopted until subsequent to the time that this particular insurance policy was issued. Therefore, we submit that whatever was done after the policy was issued certainly is immaterial in this case.

The Court: Motion granted.

Mr. Dillon: Mark this for identification.

The Clerk: Defendant's Exhibit H. for identification.

(The document referred to was marked Defendant's Exhibit H for identification.)

Mr. Dillon: Government offers in evidence Defendant's Exhibit H. [31]

Mr. Hoffman: I don't see any original, your Honor. I will have to object on the ground that no proper foundation has been laid.

Mr. Dillon: Will it be necessary for me to take the stand and say that this has been taken from the records of the Veterans' Administration?

Mr. Hoffman: Certainly the carbon comes from the records of the Veterans' Administration, but there would have to be some showing that the original was mailed. It comes out of the Los Angeles office here. I have no copy of it. I have no way of knowing that it was mailed. Mr. Kelley is dead. We can't ask him. I submit, your Honor, that the mere fact that the Government has carbons doesn't lay any foundation that the original was, in fact, mailed. If it wasn't mailed, it wouldn't be binding on the insured or his beneficiary.

Mr. Dillon: I will withdraw it temporarily.

The Court: Gentlemen, we will take our afternoon recess, 15 minutes.

(At this point a short recess was taken, after which proceedings were resumed, as follows:)

Mr. Dillon: Call Dr. Burstein. [32]

DR. LOUIS L. BURSTEIN

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Louis L. Burstein, B-u-r-s-t-e-i-n.

Mr. Hoffman: We admit the doctor's qualifications, admit that he is a medical examiner for the Veterans' Administration and its predecessor, and has been for many years.

The Court: And licensed to practice.

Mr. Hoffman: Yes, we admit all of his qualifications.

Mr. Dillon: At this time Government offers in evidence Defendant's Exhibit G.

DEFENDANT'S EXHIBIT G

Exam. in compliance with

Form 2507 dated 9-23-31

M.2-MS.-18

Disability Compensation

REPORT OF PHYSICAL EXAMINATION

C-No. 1783258

1. Claimant's name—Kelley Thomas Joseph
Address—1172 Western Ave., San Bernardino,
Calif.

2. Examined — Los Angeles, Cal. 10/28/31-
10/28/31

3. Age—39

(Testimony of Dr. Louis J. Burstein.)

4. Color—W

5. If examination was made in a hospital, fill in the following:

Date of admission..... Reason:.....

Date of Discharge..... Reason:.....

6. Rank and organization—Cpl. M.G. Bn. Unassigned.

7. Date of induction—9-19-17 of discharge from service—1-16-19 (Marital status—check)

8. Brief outline of claimant's disability since service:

“Railroad brakeman before the war. Railroad fireman ever since the war. Am with the Union Pacific as a fireman on oil burners.”

9. Present complaint (subjective symptoms, not diagnosis):

“Backaches. Vision poor.”

10. Physical examination (claimant must be stripped):

Temperature—X, pulse—84, time of day—1:10 p. m., blood pressure—100 (Systolic) 80 (Diastolic); height—61 inches (With shoes); weight—119 (Without coat); standard weight before onset of present illness—118; highest weight over the past year—123; lowest weight over the past year—118. Did you weigh the claimant?—Yes. Sputum (tub. bac.)——

(Testimony of Dr. Louis J. Burstein.)

(Every case, if deemed necessary, should have a sputum examination, certified by the examining physician.)

Vision (Snellen chart):

Uncorrected	R-	/20	L-	/20
Corrected by glasses	R-	/20	L-	/20
Hearing (spoken voice)	R-	/20	L-	/20

Physical examination continued (nose and throat, sinuses; heart (see Marginal Note 1); gastro-intestinal; surgical; orthopedic, etc.):

General Appearance: We have here a small sized, well developed and well nourished man, with brown hair and blue eyes and with skin, sclera and mucosa clear.

Teeth: In apparently fair condition and adequate repair.

Scalp: Ears, Nose & Throat: Negative.

Eyes: Vide special report.

Adenopathy: None.

Reflexes: Normal.

Hernia, Hemorrhoids, Varicosities, Fistulae: None.

Torso, Head, Neck, Abdomen, Genitalia: Negative.

Cardiovascular System: Blood pressure 100/80. Pulse pressure 20. Pulse seated 84; standing 96; after fifty hops, 120; in two minutes' recumbency 84. Pulse is very small and

(Testimony of Dr. Louis J. Burstein.)

soft, almost imperceptible and diffused, of poor volume and quality but rhythmic. Exercise is attended by slight dyspnea and marked neck pulsation, with no attendant cyanosis, pallor or allorhythmia.

Inspection & Palpation: Apex is palpated in the 5th interspace with ACD within normal limits. Impulse is rather weak with moderate precordial diffusion; no thrills.

Auscultation reveals nothing of note until in dorso-recumbency, following provocative exertion, there is elicited a distant but definite low-pitched, systolic blow, gently diffused over the entire aortic area, without PMI, and with all other sounds clear. This phenomena subsides in all other postures and throughout all other procedures. Cardiac tolerance is good.

Respiratory Tract: Chest is well formed, of free and symmetrical excursion and unimpaired resonance; no rales.

Gastro-Intestinal Tract: Negative.

Genito-Urinary System: Venereal history denied. No apparent gross pathology.

Urinalysis: Report attached.

(Blood) Wasserman: Report attached.

Extremities, Back & Joints: Special orthopedic report follows:

“No evidence of deformity or disability.
No edema.”

JOHN CARLING, M.D.

Orthopedic Surgeon.

(Testimony of Dr. Louis J. Burstein.)

Eyes:

“Vision, R. 20/20; L. 20/25 Corrected
to 20/20 L. 20/20. No pathology.”

D. C. McCULLOCH.

X-ray examination (give date, place, authorship,
interpretation):

Laboratory findings (may be copied from original
laboratory report):

Laboratory Report
U. S. Veterans' Bureau
Los Angeles, Calif.

Dr. Burstein	C#1783-258
Name—Kelley, Thos. J.	Date—10-30-31

Wassermann Report
Cholesterin Antigen

Water Bath—Positive

L. GILMORE
Serologist

Examination of Lungs

Shape of chest , mobility

Palpation:

Percussion—Right lung:

Left lung:

Auscultation (during normal inspiration following
expiratory cough; state quality and location of
rales):

Right lung:

Left lung:

Summary of lung findings (indicate areas of infiltration, consolidation, etc., by lobes; add tuberculous complications):

Pulmonary diagnosis—

General diagnosis (based on entire physical condition:

(a) Aortitis, chronic, mild, with good cardiac tolerance.

Is claimant bedridden?—No Is he confined to his bed No because of pulmonary condition?..... or because of other disability?

Is claimant able to travel?—Yes

Do you advise observation to determine diagnosis?—No

Will claimant accept hospital care?—Yes

Is an attendant necessary for travel?—No

Did you examine the claimant yourself?—Yes

Name of Examiner—Louis L. Burstein, M.D.

Title—Attending Specialist (Cardiologist)

Address of Examiner—USVB Los Angeles, California.

(Each examiner will sign his name, and date, immediately following his findings, in a composite report of examination.)

Statement by Claimant.—My answers to Question 9 have been read to me* and I hereby certify that the complaints therein recorded are all that I am suffering from to my knowledge.

(Testimony of Dr. Louis J. Burstein.)

(*The examining physician will read complaints noted in answer to Question 9 before the claimant's signature is affixed.)

Signed THOMAS J. KELLEY.

(Signature of claimant)

D. C. McCULLOCH, M.D.

Attending Specialist (EENT)

JOHN CARLING, M.D.

Attending Specialist (Orthopedic)

[Endorsed]: Deft. Ex. G. iden. Filed 5/27, 1941.

By Cross, Deputy Clerk. (Later into evidence.)

Mr. Hoffman: If I might ask a question of the doctor about this exhibit before it is admitted.

The Court: Yes, you may.

Examination

By Mr. Hoffman:

Q. I show you, Doctor, Defendant's Exhibit G for identification, Examination made October 28, 1931, and call your attention to the form and the words "disability compensation." I ask you to look at that document and tell me if you know the purpose for which the examination was made.

Mr. Dillon: That doesn't go to the introduction.

The Court: I suppose, Mr. Dillon, it is merely prelim- [33] inary.

(Testimony of Dr. Louis J. Burstein.)

Mr. Dillon: It would be all right on cross-examination, but it has nothing to do with whether this can be introduced in evidence or not.

Mr. Hoffman: I think it is important, your Honor. I can't make my objection——

Mr. Dillon: Very well, I will withdraw the objection.

The Court: Proceed.

The Witness: The examination was for the purpose of establishing the presence of disability in the applicant for the purposes of compensation or pension.

By Mr. Hoffman:

Q. It was not made for purposes of treatment; I mean, that was a routine examination to determine the question of whether or not he was entitled to compensation or pension?

A. That is right.

Q. And you did not, as I understand it, advise the applicant as to the result of your findings?

A. No; I had no authority to do anything like that.

Mr. Hoffman: Then we object to the introduction of the document on the grounds, your Honor, it would be wholly immaterial either as to what the doctor found, because whatever he found, it couldn't be the basis for fraud unless the knowledge was communicated to the insured. The claim here is that he fraudulently stated that he was in good health, and the doctor didn't tell him he wasn't in [34]

(Testimony of Dr. Louis J. Burstein.)

good health; then whatever the doctor found would be wholly immaterial; secondly, on the ground that whatever examinations might have been made for purposes other than insurance, under the cases that are cited in proposed instruction No. 8 would be immaterial; and on the additional grounds, your Honor, the principal ground was the one I first stated, that since the doctor says it was for a purpose other than insurance, and also that he didn't communicate the findings to the insured.

The Court: He didn't say "other than insurance." He said, "for insurance."

Mr. Hoffman: No, your Honor. He said it was for compensation and pension, not for insurance. This man hadn't applied for any insurance when this examination was made.

Mr. Dillon: It was made to discover whether or not he had any disability.

(Argument)

Mr. Dillon: The reason for the introduction of this examination is to show this man did have these disabilities; further, to show through this doctor that he was advised of them, knew he did have them. First we have got to establish that he did have them before we can establish that he was advised of them.

Mr. Hoffman: I understood the doctor to just testify that he didn't advise the Plaintiff— [35]

Mr. Dillon: He did not; that is agreed.

(Testimony of Dr. Louis J. Burstein.)

Mr. Hoffman: —that is, the insured, as to the result of the examination; that he had no authority to do it, and he didn't do it.

Mr. Dillon: That is correct.

Mr. Hoffman: What materiality has a medical report when the issues in this case are not, did he or didn't he have certain disabilities, but did he know that he had them.

Mr. Dillon: First we have got to establish that he had them before he could know he had them.

The Court: I will permit you to renew your objection later, Mr. Hoffman, and also move to strike, in view of the statements Government has made.

Direct Examination

By Mr. Dillon:

Q. I hand you Defendant's Exhibit 5, Doctor; calling your attention to the last page there, I will ask you if that is your signature attached thereto.

A. Yes, sir.

Q. Do you have any independent recollection of an examination made of Thomas Joseph Kelley at Los Angeles on October 28, 1931?

A. Independent recollection?

Q. Yes.

A. You mean aside from the records? [36]

Q. Yes. A. I have not.

Q. Then, Doctor, using Defendant's Exhibit G to refresh your recollection, will you state—

(Testimony of Dr. Louis J. Burstein.)

Mr. Hoffman: Pardon me. Before it is shown to the witness, I would like to examine the witness as to whether or not looking at it would refresh his recollection or whether it wouldn't. In other words, it may be that the doctor would say, "I could look at it for a couple of weeks; I still wouldn't remember this man; but what I put down in that report is what I found at the time." But I maintain that report is the best evidence. If the witness can't testify that by looking at it, that would then refresh his recollection so that he could then testify regarding this particular examination, he couldn't refer to the exhibit. Subject to my objection, which your Honor was kind enough to allow me, reading it into evidence, I maintain this witness can't testify as to its contents because the report itself is the best evidence.

The Court: That is correct, as far as you go. Of course, the witness testified that without it he has no independent knowledge. Now, refreshing his memory with the name and what is written upon it, probably some of it in his own hand, then he would probably be able to recall some of the circumstances, which is very usual of a witness. I don't know. If he does, then, of course, it is perfectly [37] proper.

Mr. Hoffman: Doctor, if you looked at that report, would that recall to you the examination that you made of this man?

The Witness: No, sir.

(Testimony of Dr. Louis J. Burstein.)

Mr. Hoffman: I object to the use of the document.

(Argument)

The Court: Proceed, counsel.

By Mr. Dillon:

Q. At that time what physical examination did you make of Thomas J. Kelley, and what was your diagnosis?

A. This was a complete examination made by a board of three doctors of which I was chairman.

Q. What was the diagnosis, Doctor?

A. The diagnosis at that time was chronic mild aortitis with good cardiac tolerance.

Q. Now will you explain what "aortitis" means?

Mr. Hoffman: Pardon me, your Honor. May it be understood that my objection is to the introduction of the document, and any objection I have to the reading of it on the grounds that it is immaterial will also be reserved.

The Court: I think you better make your objections to specific questions because certainly a medical term can be explained by a witness, because neither the jury and certainly the Court is unable to tell what these medical terms are. [38]

Mr. Hoffman: Or counsel, talking for myself. My objection was to the question just before this one, "Now, Doctor, what is the diagnosis." I just want my objection to that reserved. There is no objection to this next question.

(Testimony of Dr. Louis J. Burstein.)

The Court: All right.

By Mr. Dillon:

Q. Will you explain that diagnosis, Doctor?

A. The word "aortitis" is simply an inflammation of the aorta. The aorta is the large blood vessel leading out of the heart, the initial stage of the distribution of the blood all through the body. That is the large vessel. When this vessel becomes involved in an inflammation, we take the term from the name of the vessel itself and we call it an aortitis, the same as appendicitis; appendicitis is named after the appendix; so aortitis would be an inflammation of this great vessel, the aorta.

Q. When a diagnosis of aortitis is made, is that suggestive to an expert like yourself who made the examination of a concomitant condition of some character? A. Yes.

Q. Of what condition is that usually indicative?

A. The word "usually," I can't use the word "usually" there; but with a diagnosis of that kind we always call for a blood test for evidence of syphilis.

Q. Was a blood test called for in this case?

A. A blood test was called for. [39]

Q. Did you receive a report of that blood test?

A. Yes, sir.

Q. What did that blood test show?

Mr. Hoffman: Same objection. I understand the same ruling.

(Testimony of Dr. Louis J. Burstein.)

The Witness: It came back positive from the laboratory. I don't know the exact proportion just offhand, but it fits in with the diagnosis of aortitis.

By Mr. Dillon:

Q. Doctor, basing your answer on your experience as an expert, from the examination you have before you in 1931, I ask you if the evidence in this case shows that Thomas J. Kelley died on August 10, 1935; that the principal cause of his death was aneurism of the aortic arch, luetic, with compression of trachea, would or would not, in your opinion, that be a progression from the condition you found in 1931?

Mr. Hoffman: Object to that on a number of grounds; 1, it is assuming a fact not in evidence; secondly, that it is immaterial in this case what this man died of, or whether his condition progressed or didn't progress subsequent to the time of the application for insurance. Now, the question isn't, Did he or didn't he die of this disease; the question is, Did he know of it and was it of sufficient severity to interfere with his occupation and ability to follow an occupation at the time he made the application, not what happened afterward. [40]

Mr. Dillon: Ability to follow an occupation has nothing to do with the case. The effect of this is to show the materiality of the misrepresentation; that it was of such serious significance that it developed into his death. There couldn't be anything more material that I could see.

(Testimony of Dr. Louis J. Burstein.)

The Court: Objection overruled. Give your answer, Doctor, please.

The Witness: Will you repeat the question?

(The question referred to was read by the reporter, as follows:

“Q. Doctor, basing your answer on your experience as an expert, from the examination you have before you in 1931, I ask you if the evidence in this case shows that Thomas J. Kelley died on August 10, 1935; that the principal cause of his death was aneurism of the aortic arch, luetic, with compression of trachea, would or would not, in your opinion, that be a progression from the condition you found in 1931?”)

The Witness: It would.

Mr. Dillon: That is all; thank you. [41]

Cross Examination

By Mr. Hoffman:

Q. Doctor, when you examined this man was he stripped?

A. All my patients are stripped.

Q. Then this man would be stripped?

A. Yes, sir.

Q. Naked?

A. Absolutely naked from head to foot.

Mr. Hoffman: That is all.

Mr. Dillon: That is all; thank you, Doctor.

(Witness excused.)

MRS. GLADYS H. SIMPSON

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Mrs. Gladys H. Simpson, S-i-m-p-s-o-n.

Direct Examination

By Mr. Dillon:

Q. Where were you employed in November, 1931?

A. I was employed at the United States Veterans' Administration Bureau at that time in Los Angeles.

Q. What was your position and what were your duties there?

A. I was an adjudication clerk in the Adjudication [42] Division, and my work consisted of making awards of compensation and advising claimants as to the contents of same.

Q. I hand you Defendant's Exhibit H, and call your attention to the printed letters at the right-hand corner, and ask you what they are.

A. You are referring to the printing?

Q. Yes. A. It says, "File GHS."

Q. Whose initials are "GHS"?

A. They are my initials.

Q. And it was your custom, or was it not, at that time, to use a stamp to put those initials on those letters? A. Yes.

(Testimony of Mrs. Gladys H. Simpson.)

Q. When those initials were put on that letter what did that indicate?

A. That indicated that I had read the contents thereof and sent it to the file, this copy for our file, at that time.

Q. From your own knowledge after that letter had been dictated and approved by you what was the custom as to its mailing?

Mr. Hoffman: Object to a custom, your Honor. The question is whether this particular letter, if she knows, was mailed.

The Court: Overruled. [43]

By Mr. Dillon:

Q. Please state.

A. I didn't get the question.

Q. What was the custom then as to the mailing after you signed the letter; what did you do with it?

A. Well, I deposited the letter in the mail box there in the section—a mail box, I should say.

Q. Then what was the custom, to your knowledge, as to what happened to that letter in that basket?

A. Then it went to the mail section, of course.

Q. Then when it got to the mail section what was done with it there?

A. Well, they sent the letter out.

Q. Put it into the mail, you mean?

A. Yes.

Mr. Dillon: That is all; thank you.

(Testimony of Mrs. Gladys H. Simpson.)

Cross Examination

By Mr. Hoffman:

Q. Did you sign the letter personally, Mrs. Simpson, or did you just—— A. Apparently I did.

Q. Mrs. Simpson, will you show me where your initials are on this document, Exhibit F?

A. My initials aren't there, but my file stamp is there. [44]

Q. You have better eyesight than I have. Let me see if I can see it. Point it out to me.

The Court: Point it out to counsel.

The Witness: "File GHS." (Indicating)

By Mr. Hoffman:

Q. Then you put that on there so that somebody in the bureau there would then have authority to file away the carbon; is that right?

A. Yes; I did—I beg your pardon. I filed the carbon myself in the folder.

Q. You don't sign the letters, do you?

A. I had authority at that time, yes.

Q. Did you, do you remember?

A. Apparently I did.

Mr. Hoffman: No further examination.

(Witness excused.) [45]

RICHARD P. HASKINS

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Richard P. Haskins, H-a-s-k-i-n-s.

Direct Examination

By Mr. Dillon:

Q. Mr. Haskins, where are you employed?

A. Veterans' Administration.

Q. What is your present position?

A. Chief of the Mail and Records Section.

Q. In November 1931 where were you employed?

A. Mail and Record Bureau.

Q. Do you have personal knowledge of the custom, practice and usage of the Veterans' Administration mail room and facilities?

A. Yes, sir.

Q. In November 1931 when a letter had been dictated and signed, then placed in the box for outgoing mail, what happened to it then?

A. Well, it was picked up by the messenger and delivered to the mail room where it was folded and put in an envelope and mailed out.

Mr. Dillon: That is all; thank you.

Mr. Hoffman: No cross examination.

(Witness excused.) [46]

Mr. Dillon: Government now offers in evidence Government's Exhibit marked for identification H.

Mr. Hoffman: To which we object, your Honor. No notice to produce has ever been served on the Plaintiff.

(Argument)

The Court: Objection overruled. It will be admitted in evidence.

The Clerk: Defendant's Exhibit H.

(The document referred to was received in evidence and marked Government's Exhibit H.)

DEFENDANT'S EXHIBIT H

File
G.H.S.
11-18

Nov. 17, 1931.

AC.4/AS.9

Mr. Thomas Joseph Kelley,
1172 Western Ave.,
San Bernardino, California.

C-1 783 258

Dear Sir:

Your claim for disability allowance under Section 200, World War Veterans Act, 1924, as amended, has been considered by the Rating Board of this office.

Your disability, aortitis, chronic, mild, is rated less than permanent partial 25%. In order to be eligible for disability allowance, a rating of permanent partial 25% or more is necessary. Your claim

for disability allowance, accordingly has been disallowed.

Your claim for disability compensation was also considered under date of November 13, 1931, and it is the decision of the Board that your disability, aortitis, chronic, was not incurred in or aggravated by your service. A compensable disability must have been incurred in or aggravated by service and exist to a degree of ten percent or more. It was, therefore, necessary to disallow your claim for disability compensation.

By direction,

R. B. LEACH,

Regional Adjudication Officer,
Los Angeles, California.

[Endorsed]: Deft. Exhibit No. H. ident. Filed 5/27, 1941. By Cross, Deputy Clerk. (later in evidence.)

Mr. Dillon: At this time I will read Defendant's Exhibit H, your Honor.

(Reading exhibit)

Government rests, your Honor.

The Court: How much time do you want to argue?

Mr. Hoffman: We have some rebuttal. [47]

ROSETTA ALICE KELLEY

the plaintiff herein called as a witness on her own behalf, in rebuttal, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please.

The Witness: Rosetta Alice Kelley.

Direct Examination

By Mr. Hoffman:

Q. Mrs. Kelley, you are the plaintiff in this case?

A. I am.

Q. And Thomas Joseph Kelley was your husband during his lifetime? A. Yes, sir.

Q. When did you first meet Mr. Kelley?

A. I met him in 1921.

Q. When were you and Mr. Kelley married?

A. 1922.

Q. Where? A. In San Bernardino.

Q. Did you live there after that?

A. We lived there ever since.

Q. When did Mr. Kelley go up to the Presidio at San Francisco in connection with his duties as a Reserve Officer?

A. Well, he went up about once every year.

Q. Did he go up in 1934? A. Yes, sir. [48]

Q. And between the time that you first met Mr. Kelley and the early part of 1934 what was his occupation?

A. He was a locomotive fireman for the Union Pacific Railroad.

(Testimony of Rosetta Alice Kelley.)

Q. Did he work for the railroad during all that time as a locomotive fireman? A. Yes, sir.

Q. And how often did he work, how many days a week?

A. He was subject to call 24 hours. He was on the helpers service.

Q. How many days a week did he actually work on an average?

A. He had to work eight hours a day anyway.

Q. Every day?

A. Yes, sir, on to 16 hours.

Q. Sometimes he worked 16 hours?

A. Yes, sir.

Q. Was that true in the year 1930?

A. Yes, sir.

Q. And 1931? A. Yes, sir.

Q. 1932?

A. Well, no; he worked from 8 to 12 hours a day in 1932.

Mr. Dillon: That is immaterial. The man's work record is not in issue. [49]

Mr. Hoffman: We maintain, your Honor, that a man working 16 hours a day is certainly not telling a lie when he says he is in good health.

Mr. Dillon: That isn't the test, your Honor. A man with great disability can work under unusual circumstances and very often does.

The Court: It would be just a circumstance.

(Testimony of Rosetta Alice Kelley.)

By Mr. Hoffman:

Q. Mrs. Kelley, during this time was Mr. Kelley away from home on account of illness, that is, before the early part of 1934 when he went to the Presidio the last time?

A. He never was home sick until the last time he took sick.

Q. That was on his return from the Presidio, California?

A. Yes, sir; he took sick up there.

Q. Did he ever complain to you about any illness or disease or disability?

Mr. Dillon: I object, your Honor, hearsay.

The Court: Yes.

Mr. Hoffman: We don't expect to prove what he said; just the fact as to whether he did or didn't complain would go to show whether or not he consciously made any misrepresentations.

The Court: Objection of the Government sustained. [50]

By Mr. Hoffman:

Q. Do you know whether or not at any time before 1934 when he returned from the Presidio he had consulted a physician?

Mr. Dillon: Of your own knowledge.

The Witness: No, I don't.

By Mr. Hoffman:

Q. Did any doctor bills come to the house?

Mr. Dillon: That is objected to as immaterial.

(Testimony of Rosetta Alice Kelley.)

The Witness: The company doctor always had him come every so often to be examined by the company; every two years they had to take an examination. That is all I know of.

By Mr. Hoffman:

Q. The only doctors he ever saw or consulted were the physical examinations that were made in connection with his work for the Union Pacific?

A. Yes, sir.

Mr. Dillon: I object, your Honor. That is just hearsay on her part.

Mr. Hoffman: If she knows.

Mr. Dillon: She just said now that she didn't.

The Court: You said you didn't?

The Witness: No, I didn't.

The Court: It may go out.

Mr. Hoffman: You may cross examine. [51]

Cross Examination

By Mr. Dillon:

Q. Do you know of your own knowledge that, as a matter of fact he had considerable treatment for his back? A. No, I don't know.

Q. You don't know that he went to any osteopath? A. No, I don't.

Q. Do you know Dr. King?

A. I know of him, yes, sir.

Q. You don't know of your own knowledge that he gave treatments to your deceased husband?

A. No, I don't.

(Testimony of Rosetta Alice Kelley.)

Q. Did you know Dr. Lenker? A. Yes, sir.

Q. Do you know of your own knowledge whether or not he consulted Dr. Lenker?

A. He was the company's doctor.

Q. Do you know of your own knowledge whether Dr. Lenker is alive or not? A. He is dead.

Mr. Dillon: That is all.

Mr. Hoffman: That is all, Mrs. Kelley.

The Court: Mrs. Kelley, your husband died on August 10, 1935?

The Witness: Yes, sir.

The Court: How long was he ill before that?
[52]

The Witness: Well, he went up to the Reserve Officers Training in February 1934, and he took a heavy cold and took down with pneumonia after he got up there. He was up there for six weeks, seven weeks.

The Court: He went up there in February, '34?

The Witness: Yes, sir.

The Court: He remained up there for seven weeks?

The Witness: Yes, sir.

The Court: Then he returned some time in April?

The Witness: In April or May, somewhere around in there.

The Court: To San Bernardino?

The Witness: Yes, sir; he came home. I had to help him into the car. I went up and met him at

(Testimony of Rosetta Alice Kelley.)

the station. I had to help him in the car. Then he went to the hospital there in San Bernardino and was there for six weeks with pneumonia.

The Court: He died in the hospital?

The Witness: Sawtelle, yes, sir.

The Court: Sawtelle?

The Witness: Yes, sir.

The Court: That is here, is it?

The Witness: Yes, West Los Angeles.

The Court: That is all.

Mr. Hoffman: We have no further testimony right now. [53]

The Court: In view of the fact that we can conclude this case tomorrow, get the arguments in in the morning, and the jury will be able to receive the case in the afternoon, gentlemen, we will now take an adjournment until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken at 4:15 o'clock p. m. to Wednesday, May 28, 1941 at 10:00 o'clock a. m.) [54]

Los Angeles, California

Wednesday, May 28, 1941 10:00 O'clock A. M.

The Court: Gentlemen, will you stipulate the jury are all present?

Mr. Hoffman: Yes, I will so stipulate, and they have been present at all stages of the proceeding.

So stipulated, Mr. Dillon?

Mr. Dillon: Yes.

Mr. Hoffman: Call Dr. Chapman.

DR. JAMES L. CHAPMAN

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, Doctor?

The Witness: James L. Chapman.

Direct Examination

By Mr. Hoffman:

Q. What is your profession or occupation, Doctor? A. Physician and surgeon.

Q. What schools did you attend?

A. University of California at Berkeley and the University of Southern California in Los Angeles.

Q. And you are regularly admitted to practice medicine [55] in the State of California?

A. I am.

Q. Do you have any occupation or duties in connection with any insurance company?

A. I have.

Q. What are they?

A. I am examiner for life insurance for five different companies, for one of which I am chief medical examiner.

Q. Besides that do you have a general practice, Doctor? A. I do.

(Testimony of Dr. James L. Chapman.)

Q. Do you hold a commission in the armed forces of the United States in the Medical Corps Reserves?

A. I do.

Q. Now, Doctor, I show you Defendant's Exhibit G, a medical report made October 28, 1931, and ask you to look at the same, with the exception of the diagnosis which is on the back page. Will you just read this report other than the last page thereof?

Now, Doctor, is there anything in that report that indicates, taking the report as a whole—would you say that the person examined, Thomas Joseph Kelley, suffered from any diseases or disability at that time which were of sufficient severity as would call itself to his attention; in other words, of such severity that he would be cognizant and know that he had it, any disability? [56]

Mr. Dillon: Objected to, your Honor. It would be speculating on the part of the witness. He is no position to determine what Mr. Kelley would have thought.

The Court: In that form I will have to sustain the objection. He wouldn't know, counsel, what would be in the man's mind.

Mr. Hoffman: I didn't mean that, your Honor.

Q. Is there any disability or disease that is shown in the report, assuming the facts set forth there are true, of such severity, or of sufficient severity so that the patient would be cognizant of the disability?

(Testimony of Dr. James L. Chapman.)

Mr. Hoffman: The doctor can—for example, there is the report as to the condition of his heart. Let's say that the doctor's opinion was that the heart condition wasn't sufficiently severe that it would be noticeable by the man himself. I am not talking about any person.

Mr. Dillon: Is this a question or argument?

The Court: I think counsel is trying to sustain his position on his question, isn't that so?

Mr. Hoffman: Yes.

The Court: I believe Government's objection, counsel, is good. I think the doctor can testify as to his condition and the aggravation of it, if any. I think it would have to be a matter for the jury to determine from his professional knowledge and as an expert, the ultimate fact which you have just indicated. If you will proceed along that line. [57]

By Mr. Hoffman:

Q. Is there anything in that report, Doctor, that indicates that his vision was poor at the time of the examination?

A. The report states it was normal.

Mr. Dillon: I would like that premise, in the doctor's opinion.

Mr. Hoffman: Everything he says is in the doctor's opinion. He has never seen Mr. Kelley or examined him. I am asking for opinion evidence.

The Court: It will be so understood.

(Testimony of Dr. James L. Chapman.)

By Mr. Hoffman:

Q. Is there anything in that report that indicates that he at that time suffered from any condition that would cause a backache?

Mr. Dillon: I object, your Honor. As pointed out yesterday, the report speaks for itself. There is no explanation the doctor can make because he never examined the man. He can explain some terms, but he can't go into the findings of the report which would speak for themselves.

The Court: Counsel, I am inclined to agree with part of Government's position on that; but it is proper under the law of evidence for a doctor to be asked, assuming that a person had a certain affliction, what effect it would have, and as to that extent I think it is proper.

Mr. Dillon: If he takes a hypothetical question, I have [58] no objection.

Mr. Hoffman: I will skip that for the moment.

Q. Calling your attention to the report that reads as follows: "Extremities, back and joint special orthopedic report; no evidence of deformity or disability; no edema; John Carling, M. D., Orthopedic Surgeon." Is there anything in that portion of the report or elsewhere in the report that shows any abnormal condition of this man's back?

Mr. Dillon: I object, your Honor. The opinion would be based on the diagnosis of another physician.

(Testimony of Dr. James L. Chapman.)

Mr. Hoffman: That is not a diagnosis there. He says he made an orthopedic report, the Government doctor, and found nothing abnormal.

Mr. Dillon: Where is the report?

Mr. Hoffman: That is the report, not his diagnosis.

The Court: If you frame it in the form of a hypothetical question, you may proceed.

By Mr. Hoffman:

Q. Doctor, assuming the following facts to be true; that on October 28, 1931 there was no edema present, and an examination of the extremities, back and joints showed no evidence of deformity or disability; assuming also all the other facts and matters set forth in that report that you have read are true, excluding therefrom the diagnosis; is there anything in that report that shows any disability or disease or injury or abnormality of the back?

[59]

Mr. Dillon: The report speaks for itself. There are only two findings in the report.

Mr. Hoffman: Will you stipulate there was nothing wrong with his back?

Mr. Dillon: The report speaks for itself. It states there was no abnormality found, so there is no question of opinion from the witness at all.

Mr. Hoffman: If the Government's position is that there was nothing wrong with his back, I am not going to pursue it any further. Is that your position?

(Testimony of Dr. James L. Chapman.)

Mr. Dillon: Our position, you know, is not that. Our position is that the report made at that time shows there was no abnormality in the back.

By Mr. Hoffman:

Q. Doctor, assuming the facts in that report are true, and assuming that at the time and before the report was made, and thereafter until January of 1934 Mr. Kelley was employed as a railroad fireman and worked not less than six days a week, and from 8 to 14 hours a day; have you an opinion as to whether or not his condition at that time in October 1931, the date of that report, was such that it would affect his ability to pursue his usual vocation?

Mr. Dillon: I object to that, if your Honor please; first, it is without the issues; second, his condition is the determinative issue in this case.

[60]

By Mr. Hoffman:

Q. Assuming all these facts that I have related heretofore to you, Doctor, to be true, what effect, if any, would any disability that is shown in that report have upon his ability to pursue his usual vocation?

A. I don't believe it would have any effect.

Q. Now, Doctor, I show you Defendant's Exhibit A and call your attention to the medical examiner's report beginning with what is set forth as Paragraph 2. I ask you whether that report shows any disease or abnormality of mind or body,

(Testimony of Dr. James L. Chapman.)

assuming the facts therein set forth are true, and if so, what.

Mr. Dillon: Objected to because the report itself shows on its face that there were no disabilities found by the medical examiner at that time.

Mr. Hoffman: If that is the Government's position——

The Court: Counsel has just stated that this doesn't indicate any abnormality.

Mr. Hoffman: If that is his position and he is not going to retract from it, we will not pursue the matter any further.

Q. Now, Doctor, I will ask you this: Is there anything in the report of October 28, 1931 that indicates the presence of any chancre or chankroid or scar, resultant scar therefrom, in that examination.

Mr. Dillon: If your Honor please, the report speaks [61] for itself. There is nothing said about it in that report. How could he possibly draw any conclusion.

The Court: Sustain the objection.

Mr. Hoffman: Is it your position also that there is no such thing in there?

The Court: Counsel has just stated that it isn't in there.

Mr. Hoffman: Fine, your Honor; that is splendid.

Q. Now, Doctor, you have treated and examined people with regard to venereal diseases?

(Testimony of Dr. James L. Chapman.)

A. Yes.

Q. And the disease known as syphilis?

A. Yes, I have.

Q. You will notice in that report that it states there is a positive blood Wassermann. Is there anything in the report, the entire report, that indicates that at that time the syphilitic condition, assuming that it existed, had any effect upon the health or bodily condition of the patient?

A. No, it had no effect, visible effect, at that time.

Q. Now, Doctor, in regard to the disease of syphilis, generally speaking, is the patient cognizant of the disease prior to the time that he has a severe breakdown—let's frame it this way: Is it usual that people who are suffering from syphilis in its earlier or milder stages do not know [62] that they have the disease?

A. No; they usually know it.

Q. How is the disease manifested to their knowledge?

A. By abrasions on different parts of the body, angry appearing abrasions or sores, followed by rashes on the body with a period of headache, chills, fever—at the onset of the rash, I am speaking of—sore throat, general feeling of poor health.

Q. What effect does the disease have upon their ability to work?

A. At that time it would hinder a person's attempt to work.

(Testimony of Dr. James L. Chapman.)

Q. Now, Doctor, assuming that on the date of this examination in October 1931 the patient was given a thorough examination and was stripped naked; the examiner found or made no note of any rashes, abrasions, sores, no complaints of headache. Have you an opinion as to the severity or the condition of the syphilis at that time?

Mr. Dillon: Objected to, your Honor. It would be simply conjecture. There is no diagnosis in the report of syphilis.

Mr. Hoffman: That is what I am complaining about.

Mr. Dillon: There isn't a word of syphilis used in the report. He would be testifying about something that doesn't exist as far as the evidence in that report goes.

Mr. Hoffman: Is it the position of the Government now [63] that the positive syphilis laboratory report is not true or correct; that you are not claiming he suffered from syphilis?

Mr. Dillon: Don't be silly. I say there is no diagnosis of syphilis in that report. Of course, there is a positive Wassermann; but there is no basis in that report for any diagnosis of syphilis.

Mr. Hoffman: Your Honor, this doctor can't base his diagnosis on the diagnosis of any other doctor. That has been settled. I am asking him—I thought it was plain language, as plain as I am capable of, which has a lot of limitations, your Honor, trying to ask him whether, assuming that he was stark naked and the doctor made a careful

(Testimony of Dr. James L. Chapman.)

examination of him, and assuming he found no such scars, abrasions, rash, and so forth; and assuming at the same time that a laboratory report showed a positive Wassermann, and then asking the doctor if he had any opinion as to the severity of the disease at that time.

Mr. Dillon: I will withdraw my objection.

The Court: Counsel, if you put your question as you have explained, your hypothetical facts, there is no objection. The objection of the Government was that you have referred to a report in which there was no mention of syphilis made, and therefore you negative the proposition that you propounded. [64]

By Mr. Hoffman:

Q. Assuming, Doctor, the following facts to be true: That on October 28, 1931 Mr. Kelley received a thorough and complete examination, at which time he was stripped naked, and that at no time was any discovery made of any rash, scars, chancre, or any of the other matters that you related heretofore as being things that call their attention to the patient of the presence of syphilis, and that there was a positive Wassermann; I will ask you whether you have an opinion as to the extent and severity of the disease of syphilis if the patient was then suffering from it.

Mr. Dillon: I object, your Honor, for the reason that there has been no evidence that there was any such indications; secondly, the positive evidence that there must have been some indication or a

(Testimony of Dr. James L. Chapman.)

Wassermann wouldn't have been taken. So the question is not a fair question.

The Court: Read the question.

(The question referred to was read by the reporter as follows:

"Q. Assuming, Doctor, the following facts to be true: That on October 28, 1931, Mr. Kelley received a thorough and complete examination, at which time he was stripped naked, and that at no time was any discovery made of any rash, scars, chancre, or any of the other matters that you related heretofore as being things that call [65] their attention to the patient of the presence of syphilis, and that there was a positive Wassermann; I will ask you whether you have an opinion as to the extent and severity of the disease of syphilis if the patient was then suffering from it.'")

The Court: Counsel, was the Wassermann made the same date, October 28, 1931?

Mr. Hoffman: About two days later. It was part of the same report, attached to it. Government introduced it into evidence.

Mr. Dillon: We admit the report of the Wassermann.

(Argument)

The Court: I am inclined to think, counsel, that this is a matter of argument to the jury as to what the conditions were at that time. The Government

(Testimony of Dr. James L. Chapman.)

has taken its position as to what its argument is going to be. I will overrule the objection and permit the witness to answer.

The Witness: My opinion is that that condition of his blood and of his organs, if affected at that time, was in a very mild degree.

By Mr. Hoffman:

Q. Can you tell us, Doctor, the meaning of the following, if it has a common meaning in the medical profession: "Genito-urinary system: No apparent gross pathology." What is meant by the word "pathology"?

A. Disease. [66]

Mr. Hoffman: You may cross examine.

Cross Examination

By Mr. Dillon:

Q. Doctor, of what company are you chief examiner?

A. State Life Insurance Company of Indiana.

Q. What?

A. State Life Insurance Company.

Q. And what are the other companies that you examine for?

A. The Manhattan Life of New York, Liberty Life of Topeka, Kansas, Northern Life of Seattle, Washington.

Q. Doctor, if you are examining an applicant for these companies, and as a result of that examination you found an aorta, and that led you to have a Wassermann made, and that Wasserman was

(Testimony of Dr. James L. Chapman.)

positive; would you recommend that applicant as a good risk for insurance?

Mr. Hoffman: Object to that, your Honor, on the ground it is not proper cross; also that that isn't the issue here in this case.

Mr. Dillon: This is cross examination of the doctor.

Mr. Hoffman: There was nothing brought out in chief as to what he would do or wouldn't do.

The Court: If I get your point, Mr. Dillon, it goes to the question of whether or not he would consider such a man, in his professional opinion, in good health? [67]

Mr. Dillon: That is it.

The Court: I will sustain the objection in the form that is put.

By Mr. Dillon:

Q. Doctor, if in your examination you found aorta, and that led you to have a Wassermann made, and that Wassermann was positive, would it be your opinion that that man was in such good health as to recommend him as an insurance risk at that time?

Mr. Hoffman: That is objected to on the same grounds as before. It is the identical question.

The Court: Overrule the objection. Proceed.

The Witness: Would you repeat what I found on that particular person?

(Testimony of Dr. James L. Chapman.)

The Court: It is not what you found on that party. The question is a hypothetical question, and you are to assume that the facts stated in counsel's question are correct; whether they are or not, you are to assume that they are correct and express your opinion.

Now, Mr. Reporter, will you read the question?

(The question referred to was read by the reporter, as follows:

“Q. Doctor, if in your examination you found aorta, and that led you to have a Wassermann made, and that Wassermann was positive, would it be your opinion that that man was in such good health as to recommend him as an [68] insurance risk at that time?”)

By Mr. Dillon:

Q. If you found then, aortitis—I will substitute that.

Mr. Hoffman: One further objection. Object also on the grounds that no definition has been given the doctor as to the words “insurance risk.” Also that the question is not fair or complete for the reason that it hasn't been shown to the doctor, or to anybody, as to what the requirements are of the insurance company, the hypothetical insurance company that Mr. Dillon is talking about.

The Court: Objection overruled. I assume that we are dealing with a hypothetical question, and the doctor is to assume that these facts stated by

(Testimony of Dr. James L. Chapman.)

counsel are correct. It is a matter of argument for counsel, for yourself and for Government counsel, to show that they are not correct if they are not. Proceed.

The Witness: I would say that the man was a poor risk and subject to declination.

By Mr. Dillon:

Q. And if, Doctor, the same hypothetical person I have described with those conditions in 1931 died August 10, 1935 of aneurism of the aortic arch, luetic with compression of the trachea, would or would not it be your opinion that that was a progression of the condition found in 1931?

Mr. Hoffman: Will you pardon me if I interrupt you. [69] Yesterday I was under the impression, your Honor, that this exhibit had not been introduced in evidence but had merely been marked for identification. If you will recall, yesterday I objected to a question of Mr. Dillon on the ground it assumed a fact not in evidence, still under the impression that this exhibit hadn't been offered in evidence.

The Court: That was the death certificate.

Mr. Hoffman: I would like at this time to move to strike the death certificate as to any portions thereof relating to the diseases that he then was suffering from, or the cause of death, and to strike the death certificate on the grounds that the certified copy of the death certificate or the original is

(Testimony of Dr. James L. Chapman.)

inadmissible to prove the cause of death. It is admissible to prove the fact of death but not the cause, and I have three cases involving War Risk insurance, one of which is in the Ninth Circuit. The Ninth Circuit case is U. S. v. Blackburn, 33 Fed. (2d), page 564. In that case the Court said that a death certificate is "not competent evidence as to the causes of death." Then it goes on: "The ruling admitting the certificate was prejudicial because the jury would naturally attribute the early indisposition of the disease to the malady which eventually caused his death some years later." That is the same situation here. It might be inferred that because he died of a certain disability, that he had it in a severe degree before. That is one of the very reasons that the death [70] certificate is inadmissible to prove that fact.

I move to strike the exhibit, which I find has been introduced, and ask the Court to admonish the jury to disregard any of the contents of it that have been read. The fact of death, of course, has been stipulated.

The Court: It wouldn't make any difference whether the facts in the hypothetical question stated by counsel are found in any instrument. He may be using the language that is in an instrument, but it is not necessary to refer to that. He can say, "Assuming that a man had such and such, and died of it," without any certificate at all, without any discussion of the certificate. That would be proper.

(Testimony of Dr. James L. Chapman.)

Mr. Hoffman: I think there is a limitation to that rule, that is, a hypothetical question must be based upon some evidence no matter what view the person propounding the evidence gives. I couldn't ask the doctor what effect hoof and mouth disease would have on this man, when there is no evidence whatever that he had or could have had such a disease. I can't go beyond the realm of the evidence.

The Court: Well, I am sure that you are over-looking this point of evidence; that is, that you can ask any expert witness questions outside the record if you have not stipulated to his qualifications.

Mr. Hoffman: That's right. As I understand it, then, the Court will instruct the jury that the weight to be given [71] to this man's testimony must be measured by whether or not the question is supported by the evidence.

The Court: Certainly. Not only that, counsel, but the jury are the sole judges of all expert testimony. They are not bound by any expert. They will have to use their own judgment entirely on these questions of fact.

Read the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

“Q. And if, Doctor, the same hypothetical person I have described with those conditions in 1931 died August 10, 1935 of aneurism of the aortic arch, luetic, with compression of the

(Testimony of Dr. James L. Chapman.)

trachea, would or would not it be your opinion that that was a progression of the condition found in 1931?")

Mr. Hoffman: That is objected to on the further ground that it is incompetent, irrelevant and immaterial. The issue in this case is not what he died from; the issue is, Did he know he had the disease when he took out the insurance and falsely state that he didn't.

The Court: Overrule the objection.

The Witness: Is your question, Would that be a progression of the disease he had on the prior examination?

By Mr. Dillon:

Q. Yes.

A. I believe it would be a progression of that condition. [72]

Mr. Dillon: That is all; Thank you, Doctor.

Redirect Examination

By Mr. Hoffman:

Q. Isn't it true, Doctor, that a large number of people——

Mr. Dillon, this may not be actually proper rebuttal. Have you any objection on those grounds to my asking him the question?

Mr. Dillon: Let's hear the question.

(Testimony of Dr. James L. Chapman.)

By Mr. Hoffman:

Q. Doctor, are there any persons under the age of 40 years who have been employed for 10 or 15 years as railroad firemen who would be 100 per cent free from any abnormal condition in the mind or body in your opinion?

Mr. Dillon: I am sure the doctor will answer no.

The Court: Well, let the expert answer.

The Witness: Perhaps I didn't just quite get the question.

The Court: Read the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

“Q. Doctor, are there any persons under the age of 40 years who have been employed for 10 or 15 years as railroad firemen who would be 100 per cent free from any abnormal condition in the mind or body in your opinion?”) [73]

The Witness: I believe there would be some abnormalities present.

By Mr. Hoffman:

Q. And do you believe, Doctor, that there would be male persons of the age of 39 or 40 years who had followed some gainful occupation since they were adults who, at the age of 39 would show no clinical or other evidence of any disease or of any injury or of any abnormality, or of any infirmity or residual of disease or injury to any degree that might in the slightest tend to weaken or impair the

(Testimony of Dr. James L. Chapman.)

normal function of the mind or body, or tend in the slightest degree to shorten life? In other words, would there be many persons, in your opinion, of that age and that experience who would be in that condition? A. No.

Mr. Hoffman: That is all.

Mr. Dillon: That is all, Doctor.

(Witness excused.) [74]

JOSEPH E. SCOTT

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Joseph E. Scott.

Direct Examination

By Mr. Hoffman:

Q. What is your occupation, Mr. Scott?

A. Title examiner.

Q. For whom?

A. Title Insurance and Trust Company.

Q. Did you know Thomas Joseph Kelley during his lifetime? A. I did.

Q. When did you first meet him?

A. In February 1923.

Q. How often did you see him between that time and February 1934? Frequently or infrequently?

(Testimony of Joseph E. Scott.)

A. Very frequently.

Q. And on those occasions when you saw him what was his apparent condition of health? Was it good or poor?

A. Good.

Mr. Dillon: I object to the "apparent condition of his health." His physical appearance is all right, but this witness is not a doctor; he can't testify as to his health. [75]

Mr. Hoffman: May I hand this case to the Court where the very question is passed upon, *Corrigan vs. U. S.*, 82 Fed. (2d), 106 on page 109, which was decided in 1936 by the Circuit Court of Appeals, Ninth Circuit; and I might refer to the citation from *Corpus Juris* at this point, your Honor which they quote with approval. You will notice the words "apparent condition of health."

Mr. Dillon: Withdraw the objection, your Honor.

The Court: Read the question.

(The question referred to was read by the reporter, as follows:

"Q. And on those occasions when you saw him what was his apparent condition of health? Was it good or poor?")

The Witness: Good. I never knew him to be sick at any time or complain.

Mr. Hoffman: Cross examine.

Mr. Dillon: No cross examination.

Mr. Hoffman: That is all; thank you.

(Witness excused.) [76]

JOHN F. HOSFIELD

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: John F. Hosfield.

Direct Examination

By Mr. Hoffman:

Q. What is your occupation?

A. Secretary-manager, Elks Lodge in San Bernardino.

Q. How long have you been secretary of the Elks Lodge in San Bernardino?

A. 17 years.

Q. And during that time have you known Thomas Joseph Kelley? A. Yes.

Q. About what year did you first meet him?

A. I have known him all that time.

Q. Did you see him frequently or infrequently?

A. I saw him frequently, two or three or four times a month, during that time.

Q. Calling your attention to all of that 17 years up to January 1934, what condition of health did he appear to you to be in? Did he appear to be sick or well?

Mr. Dillon: I object to "sick or well," your Honor. [77]

By Mr. Hoffman:

Q. Did he appear to be in good health or bad health?

(Testimony of John F. Hosfield.)

A. He appeared to be in good health.

Q. At any of those times did he make any complaint to you about his condition of health?

Mr. Dillon: Object to that. It would be self-serving, even if it wasn't hearsay.

The Court: That is a little beyond the rule, even in this case. Sustain the objection.

Mr. Hoffman: That is all.

Mr. Dillon: That is all.

(Witness excused.)

NELSON WOODS

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Nelson Woods, W-o-o-d-s.

Direct Examination

By Mr. Hoffman:

Q. Mr. Woods, what is your occupation?

A. Locomotive engineer.

Q. For what railroad do you work?

A. Union Pacific.

Q. Did you know Thomas Joseph Kelley during his [78] lifetime? A. Yes, sir.

Q. When did you first meet him?

(Testimony of Nelson Woods.)

A. Well, I have a recollection of meeting him about 1915, the first time.

Q. When after the war did you see him again?

A. Well, that would be around about '24, along in there.

Q. Do you know what occupation he followed since 1924 up to January, 1934, of your own knowledge, during those 10 years? A. Mr. Kelley?

Q. Yes.

A. He was a locomotive fireman.

Q. Did he work with you on the same locomotive during that time? A. Yes, sir.

Q. During any of that time? A. Yes, sir.

Q. When did he first start working with you on the same locomotive?

A. Well, around in '29, somewheres along in there.

Q. Up until about January or February 1934?

A. Yes, sir, along in there.

Q. During that time how many days a week, to your knowledge, did Mr. Kelley work? [79]

A. As a general thing we worked, I would say, seven days a week.

Q. Seven days a week? A. Yes, sir.

Q. How many hours a day would Mr. Kelley work?

A. That varied quite a bit. Sometimes it would run eight hours a day, sometimes nine.

Q. What would be the minimum?

(Testimony of Nelson Woods.)

A. The minimum would be about eight hours a day seven days a week.

Q. What work did he do as locomotive fireman?

A. On this particular job he had quite a bit to do because he had to throw switches; in other words——

Mr. Dillon: I don't see the materiality of this, your Honor.

Mr. Hoffman: The materiality, your Honor, is that if he was in good health, he wasn't sick, and if he wasn't sick, he didn't misrepresent anything, and consequently, if he was in good health, the Government had to issue the policy.

The Court: I assume, counsel, it is going to the question of fraud. Proceed.

By Mr. Hoffman:

Q. You may proceed as to what his duties were. You said he threw switches?

A. He had to do the duties of, you might say, [80] conductor and fireman both; he had to throw the switches, and quite often he went in and got the orders for me while I was taking care of something that might be wrong with the engine.

Q. While the engine was under way what would he do?

A. He would fire the engine.

Q. Is that strenuous work?

The Court: That is a conclusion, counsel.

Mr. Dillon: Yes.

(Testimony of Nelson Woods.)

By Mr. Hoffman:

Q. What would he do when, you say, he fired the engine?

A. Well, he would keep up 210 pounds of steam or we would have a complaint about it if he didn't, and he generally did; he was a good fireman.

Q. Explain to the jury what other things he actually did on the engine about keeping up the steam pressure?

A. It was an oil burner, you know. It is a little bit different from a coal burner, but it requires quite a bit of ability and skill to fire an oil burner properly.

Q. Does it take any physical effort?

A. Oh, yes, quite a bit.

Mr. Hoffman: You may cross examine.

Mr. Dillon: No cross examination.

(Witness excused.) [81]

JOSEPH H. GROSS

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined, and testified as follows:

The Clerk: Your full name, please?

The Witness: Joseph H. Gross, G-r-o-s-s.

(Testimony of Joseph H. Gross.)

Direct Examination

By Mr. Hoffman:

Q. What is your occupation, Mr. Gross?

A. I am a retired railroad conductor.

Q. When did you retire? A. 1937, July.

Q. Before that did you work for the Union Pacific?

A. No, I worked for the Santa Fe.

Q. And did you know Thomas Joseph Kelley?

A. Yes, sir.

Q. During what years did you know him?

A. Sir?

Q. During what years did you know him?

A. Well, for the past 10, 15 or 20 years, I expect.

Q. And did you know him in the years 1929, '30, '31, '32, and '33? A. Yes, sir.

Q. How frequently did you see him?

A. Well, very often. He was in the helper service of the Union Pacific, and I was working for the Santa Fe, [82] and we would be going to Barstow and they would be coming down. We would contact them at the top of the hill, a place we call Summit a great many times.

Q. The two railroads use the same track between San Bernardino and——

A. They use a joint track between Riverside and Daggett.

(Testimony of Joseph H. Gross.)

Q. And the times that you saw him did he appear to you to be in good health or bad health?

A. Good health.

Mr. Hoffman: Cross examine.

Mr. Dillon: No cross examination.

Mr. Hoffman: Through inadvertence I forgot to prove one paragraph of the complaint. May I have the complaint? Plaintiff would like to put in testimony in regard to Paragraph VIII of the complaint which is denied by the Government in its answer.

The Court: Will you step to the bench, counsel?
(Counsel approach the bench.)

The Court: Counsel for Plaintiff has called my attention to the allegations of Paragraph VIII, and in the opinion of the Court it is not necessary to introduce any testimony as to the allegations in Paragraph VIII, that matter being a matter entirely for the Court. Is that a correct statement?

Mr. Dillon: Yes, your Honor. [83]

Mr. Hoffman: As to Exhibit B, I move to strike on each and all of the grounds previously given.

The Court: I think I will grant that motion. Have you anything to say about it before I rule?

Mr. Dillon: I have no objection, your Honor.

The Court: All right, motion granted. The exhibits will be stricken from the record.

Mr. Hoffman: With that, Plaintiff rests.

Mr. Dillon: Defendant rests.

I would like to make a motion outside the presence of the jury, if I may.

(Whereupon the Court and counsel retired to chambers, outside the presence of the jury.)

Mr. Dillon: Comes now the Defendant and makes its motion for a directed verdict for the reason that it has established by a preponderance of the evidence its affirmative plea that fraud was perpetrated by this Plaintiff in securing the insurance herein sued upon; and for the further reason that the Plaintiff has not rebutted by any substantial evidence this affirmative plea.

The Court: Motion will be denied. Exception will be allowed the Government.

(Whereupon the Court and counsel returned to the court room in the presence of the jury.)

The Court: Gentlemen of the jury, counsel have agreed on a limitation of their argument to 20 minutes. Plaintiff [84] will first address you, and Plaintiff is privileged to take any part of that time for his opening argument.

Opening Argument on Behalf of Plaintiff

By Mr. Hoffman

Argument on Behalf of Government

By Mr. Dillon

Closing Argument on Behalf of Plaintiff

By Mr. Hoffman

Court's Instructions to the Jury

(Whereupon, at 2:45 o'clock p. m., the jury retired from the court room for deliberations.)

[Endorsed]: Filed Jan. 16, 1942. [85]

[Endorsed]: No. 10027. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Rosetta Alice Kelley, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 22, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10027

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL HEREIN

(Rule 19, Subdivision 6 of C. C. A., Ninth Circuit)

The appellant herein and the appellee having by stipulation designated the parts of the record neces-

sary for the consideration of the appeal herein, the said appellant hereby designates the points upon which it intends to rely upon the appeal herein as follows:

1. That the trial court erred in denying defendant's motion for a directed verdict, and submitting the case to the jury for its determination, for the reason that defendant, by affirmative, substantial evidence, established as a matter of law, that the insurance policy sued upon had been obtained by fraudulent misrepresentations made by the insured in his application to the defendant for said insurance.

2. That the trial court erred in ordering judgment to be entered on the verdict.

3. That the trial court erred in making and entering its minute order of July 2, 1941, denying defendant's motion for judgment notwithstanding the verdict.

Dated this 24th day of January, 1942.

WM. FLEET PALMER,
United States Attorney,

DANIEL DILLON,
Attorney,
Department of Justice,
Attorneys for Appellant.

Receipt of a copy of the within Statement of Points upon which Appellant intends to Rely on

Appeal herein is hereby admitted this 24 day of January, 1942.

SYLVESTER HOFFMAN,

Attorney for Appellee.

[Endorsed]: Filed Jan. 26, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING THE RECORD
NECESSARY FOR THE CONSIDERATION
OF THE APPEAL HEREIN

(Rule 19, Subdivision 6 of C. C. A., Ninth Circuit)

It is hereby stipulated by and between the parties hereto, through their respective counsel, pursuant to Rule 19, Subdivision 6, of the Rules of the Circuit Court of Appeals for the Ninth Circuit, that the record as designated in the stipulation filed in the District Court on the 16th day of January, 1942, and each and every part thereof, shall be and is hereby designated as the parts of the record necessary for the consideration of the appeal herein.

Dated this 24th day of January, 1942.

WM. FLEET PALMER,

United States Attorney,

DANIEL DILLON,

Attorney,

Department of Justice,

Attorneys for Appellant.

SYLVESTER HOFFMAN,

Attorney for Appellee.

[Endorsed]: Filed Jan. 26, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

AMENDMENT TO STIPULATION DESIGNATING THE RECORD NECESSARY FOR THE CONSIDERATION OF THE APPEAL
HEREIN

(Rule 19, Subdivision 6 of C. C. A., Ninth Circuit)

The stipulation heretofore filed is now amended to read that, it is hereby stipulated by and between the parties hereto, through their respective counsel, pursuant to Rule 19, Subdivision 6, of the Rules of the Circuit Court of Appeals for the Ninth Circuit, that the record as designated in the stipulation filed in the District Court on the 16th day of January, 1942, and each and every part thereof, shall be and is hereby designated as the parts of the record necessary for the consideration of the appeal herein, except that it is now stipulated that no more of the deposition of Richard B. Posey, on behalf of the defendant, be printed than now appears in the reporter's transcript of the evidence, as read in evidence at the trial.

Dated this 10th day of March, 1942.

WM. FLEET PALMER,
United States Attorney,
DANIEL DILLON,
Attorney,
Department of Justice,
Attorneys for Appellant.
SYLVESTER HOFFMAN,
Attorney for Appellee.

[Endorsed]: Filed March 11, 1942. Paul P. O'Brien, Clerk.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 1100-O'C-Civil

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION AS TO CORRECTION OF RECORD
ON APPEAL (RULE 75(H), FEDERAL
RULES OF CIVIL PROCEDURE)

It is hereby stipulated by and between the parties hereto, that the transcript of record upon appeal from the District Court of the United States for the Southern District of California, Central Division, to the United States Circuit Court of Appeals for the Ninth Circuit, is in error and is not correct; that the stipulation as to the record of appeal heretofore filed in this court provides for the "reporter's complete transcript of all proceedings" and that on page 164 of the printed transcript of record, there appears only the words "court's instructions to the jury" and that the instructions to the jury given by the court are not set forth in said transcript of record, as set forth in said stipulation, and that in that respect the reporter's transcript is not complete. That the in-

clusion of the instructions to the jury is material to the plaintiff and appellee and to the presentation of the case by said plaintiff and appellee in the said Circuit Court of Appeals.

It is further stipulated that the above entitled court direct that the said omissions be corrected and the preparation of a supplemental record or transcript of record, consisting of the instructions of the court to the jury in the above entitled cause, and that the same be certified and transmitted by the Clerk of the above entitled District Court and that the reporter be authorized and directed to prepare and transcribe, forthwith, that portion of the proceedings not heretofore transcribed, to-wit: the instructions of the court to the jury in the trial of the above entitled cause.

Dated: April 6th, 1942.

WM. FLEET PALMER

United States Attorney

DANIEL DILLON

Attorney, Dept. of Justice

Attorneys for Defendant and Appellant

SYLVESTER HOFFMANN

Attorney for Appellee and Plaintiff

Good cause appearing therefor, it is so ordered.

Dated: April 7, 1942.

J. F. T. O'CONNOR

Judge, United States District
Court

A true copy, attest, etc., Apr. 22, 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern
District of California,

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Filed Apr. 8, 1942.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

The Court: Gentlemen of the jury, it becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose.

This is an action brought by Rosetta Kelley against the Government of the United States. The action is brought under the War Risk Insurance Act of November 6, 1917, and the World War Veterans Act of June 7, 1924, and is based on the life

insurance policy issued to Thomas J. Kelley, deceased. That part of the complaint is admitted by the Government. The complaint further alleges that while T. J. Kelley was in the armed forces he obtained a \$10,000 policy and paid the premiums through January 1919; and that is admitted by the Government;

That on March 15, 1932, T. J. Kelley obtained a \$5,000 policy pursuant to Section 510 of the Veterans Act, and that the plaintiff was named beneficiary. Plaintiff alleges that the premiums were paid when due through August 1935 on said policy; and there are certain stipulated facts which are to be taken by you as proved. It is admitted by the defendant that Thomas Joseph Kelley applied and was issued a policy of insurance whereby the defendant agreed to pay Rosetta Alice Kelley, his wife, who is the plaintiff in this [87] action and the beneficiary named in the policy, the sum of \$5,000 in the event that the insured died while the policy was in force. It is also admitted that Mr. Kelley paid all the premiums at the rate of \$15.05 per month on the policy from the date of issuance until he died on August 10, 1935; and that the policy was in full force by reason of the payment of premiums on the date of his death.

The complaint further alleges that between the insured's death and October 6, 1936, plaintiff applied for benefits under this policy, and that the Director of Insurance, H. L. McCoy, denied liability. The plaintiff appealed to the Administrator

of Veterans Affairs who denied the appeal on January 22, 1936, a disagreement existing between the parties over the \$5,000 benefits.

The allegation is denied but the answer admits that on August 26, 1935, the plaintiff filed in the Veterans Administration a claim for payment to her of the proceeds of the policy of insurance; that on August 29, 1935, the Director of Insurance of the Veterans Administration decided that the insurance was not payable to the plaintiff because T. J. Kelley withheld information, material information, and made fraudulent representations as to health and treatment by physicians; and that the plaintiff was so notified on August 29, 1935; and on January 28, 1936, plaintiff appealed, and the decision was affirmed, and the plaintiff was so notified on October 26, 1936. [88]

The complaint further alleges that T. J. Kelley performed all of the things to be done on his part; that between August 10, 1935, and October 6, 1936, plaintiff made due proof to defendant of the right to benefits; and that is denied in the answer.

The Government sets up an affirmative defense. The affirmative defense, briefly, is as follows: The Government alleges that on March 15, 1932, T. J. Kelley applied for a life policy under Section 310 of the Veterans Act, and in the application he represented that he had never been treated for diseases of the heart, blood vessels or genito-urinary organs; that he had not been ill nor consulted a physician

since the date of his discharge, except for a hemorrhoidectomy in September 1920; and that he further represented that he had never had syphilis.

Relying upon the representations, the Veterans Administration issued him a policy for \$5,000.

The answer further alleges that these representations were untrue and fraudulent; and that the applicant had applied for disability compensation on September 3, 1931, representing that he had heart trouble, rheumatism and spinal trouble, and had been examined by physicians of the Veterans Administration on October 28, 1931, at which time he had syphilis and aortitis. He was notified on November 17, 1931, of his chronic aortitis;

Stating further in the answer that he had consulted a [89] physician in September 1930 and in March 1931; despite the representations of good health, the applicant was not in good health on March 15, 1932.

The answer further alleges that the applicant, T. J. Kelley, well knew that he was not in good health, and he misrepresented his condition with intent to deceive the defendant and to procure an insurance policy; that if a full disclosure of the facts had been made, defendant would not have issued the policy.

I charge you, gentlemen, that these are allegations that I have read to you both from the complaint and the answer, and the affirmative defense that the Government sets forth in its answer; and I charge you that with reference to the defense

which is interposed here by the Government, it is necessary that the Government establish those facts and has the burden of proof in so doing.

In judging the credibility of the witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence pertaining to his motives. A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence you shall believe that the probability [90] of truth favors his testimony in other particulars.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number or a presumption or other evidence which appeals to you with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence. The testimony

of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

Any evidence that has been received of an act, omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence; but evidence of the oral admissions [91] of a party other than his own testimony in this trial ought to be viewed by you with caution.

You shall not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom and as directed in my instructions and in accordance with the law as I state it to you. If in these in-

structions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegations by the preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding the possibility of error, produces [92] absolute certainty, because such proof is rarely possible.

In a civil action such as the one we are now trying, it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side; and if it causes the jurors to believe that on that issue the probability of truth favors that party.

At times throughout the trial the Court has been called upon to pass on the question as to whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not

to draw any inference as to what weight should be given to the evidence or to the credibility of the witness. In admitting evidence to which an objection is made, the Court does not determine what weight should be given to such evidence. As to any offer of evidence that was rejected by the Court, as to which objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the burden of proof as to that issue is on that party. This means that if no evidence were given on either side to [93] such issue, your finding as to it would be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of the evidence, by which is meant such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence of either side of the issue predominates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of that issue.

Whenever in my instructions I state that the burden or the burden of proof rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: that

unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same not to be true.

The term "preponderance of evidence" means such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probability of truth lies therein.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly without an inference or presumption and which in itself, if true, conclusively establishes the fact.

Indirect evidence is that which tends to establish a [94] fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence.

Indirect evidence is of two kinds, namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it must be corroborated by other evidence, direct or indirect; but unless so corroborated, the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions

of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature. The word "propensity" as used in these instructions means any natural or habitual inclination or tendency.

The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession and who is called as a witness, may give his opinion as to any such matter in [95] which he is versed and which is material to the case.

As to the opinion of expert witnesses, you may exercise an independent judgment in determining how far you will follow the opinions expressed, the credibility of the witness, and the weight to be given to his testimony, or what weight to give to the opinions of any one or more of the expert witnesses in the event of conflicting opinions.

The facts in a hypothetical question directed to an expert witness are presumed to be true for the purpose of asking the question only and for no other purpose. The opinion of the expert witness must therefore be brought to the test of the facts in order that the jury may judge what weight his opinion is entitled to receive. The truth or falsity of the purported facts included in the hypothetical question is a question for the jury to determine. The opinion can have little, if any, value or weight

unless the material facts assumed in such hypothetical question are substantially true.

You are instructed that as to the opinion of an expert witness you may exercise an independent judgment in determining how far you will follow the opinions expressed, the credibility of the witness, and the weight to be given to his testimony, or what weight to give to the opinion of any one or more of the expert witnesses, in the event of conflicting opinions, is solely for your determination.

Expert testimony is only an aid to the solution of the [96] main issue. You may follow your own convictions based upon your own experience, observations and common knowledge, although contrary to the expert's opinion evidence.

Fraud is never presumed. It is presumed that the answers of the insured were true. The burden is on the defendant to show that the answers made by the insured in his application were false by clear, cogent, convincing and satisfactory proof.

Where the evidence gives equal support to each of two inconsistent inferences, that is, to that of innocence and to that of fraud or wrongdoing, then it is your duty to find in favor of innocence and against the claim of fraud.

If evidence containing inconsistencies and incongruities is reconcilable, the presumption of innocence and fair dealing will impute the variance to misconception or mistake rather than to a wilful and corrupt misrepresentation.

A presumption is evidence and remains as evidence in this case until the rebutted by a preponderance of contrary evidence, which must be weighed and determined by you gentlemen of the jury and disappears only if the defendant produces sufficient evidence to preponderate against it.

It is presumed that the insured, Thomas Joseph Kelley, was innocent of crime or wrongdoing and that all his transactions with the Veterans Administration were fair and regular; it is also presumed that the answers of the insured [97] as made in his application were true and correct.

The question is not whether the insured had a heart ailment or any other disability or disease at or prior to the time he made written application for the policy sued upon, but whether he knew he had such diseases or disabilities, and made knowingly false answers as to whether or not he had any of the diseases or disabilities which, in his application, he denied having at that time. And even if you find from the preponderance of the evidence that he had one or more diseases at that time, you will find for the plaintiff and against the defendant on that issue unless you also find that the insured knew that he then had such diseases and that his answers, as made in the application, were knowingly false, when made by him.

The term "goodhealth" as used in the application for insurance must be considered not in the light of scientific technical definitions, but as the

term is ordinarily used and understood. Perfect health is not required.

The statements made by the insured in his application for the policy here sued upon were representations as distinguished from warranties. A misrepresentation will not constitute a defense to an action on a policy unless it was intentionally untrue or was made with a reckless disregard for its truth or falsity.

Whether or not the insured made inconsistent claims or statements as to his condition of health, or of other facts [98] material to the risk to be assumed by the insurer in issuing the policy, if true, is not of itself fatal to the right of the plaintiff, his surviving beneficiary, to recover under the policy. It is for you gentlemen of the jury to determine which, if any, of said statements were true and which, if any, were false, and which, if any, although false, were made with the intent to defraud, and which, if any, were intentionally and knowingly made with reckless disregard of the truth.

You are instructed that if the insured intentionally made a false statement in his own behalf to secure an advantage over the Government of the United States, he cannot be heard to say that the Government did not rely upon his statements. He was required, both by law and by regulations of the department, to make a showing as to his health at the time of his application.

You are instructed that the Government is not bound by the knowledge of its officers and agents.

You are instructed that the knowledge that the physicians connected with the Veterans Bureau obtained in investigating the compensation claim of this insured, though their reports be in the file concerning that claim, that this knowledge is not to be imputed to the Director in passing on the application of the insured, as a matter of law.

You are instructed that a material fact is a fact the knowledge or ignorance of which would naturally influence [99] the insurer's judgment in making the contract, in estimating the degree and character of the risk, or in fixing the rate of insurance.

Incorrect statements in the application for insurance of material representations, if known to be untrue by the insured when made, and nothing else appearing to contradict this, invalidates the policy without further proof of actual conscious design to defraud.

The statement of the insured in his application for insurance that he had not been treated for diseases of the enumerated parts of the body was a representation that would constitute a defense to this action if you find from a preponderance of the evidence that it was intentionally untrue or made with a reckless disregard for its truth or falsity.

The purpose of propounding questions of the kind under consideration and of securing answers

to them is to elicit relevant and material information which may not be disclosed by the medical examination. Such information may well furnish the basis for determining whether further examination or inquiry should be made; and that being its function, it will be presumed that the Government took it into consideration and relied upon it in the issuance of the policy. An untrue representation of that kind knowingly made is material as a matter of law without proof, and its submission implies an intent to deceive.

When the physical facts admitted as evidence in this [100] case positively contradict the statement or statements of witnesses, then the physical facts must control and the jury cannot disregard them.

Although as men you may sympathize with those who suffer, yet, as honest men bound by oath to administer judgment according to law and evidence, you should not act upon your sympathies without any proof. Therefore, motives of sympathy for the insured are not to be considered by you in any degree in arriving at your verdict in this case. Likewise, the fact that the insured may have rendered patriotic service to our country during the World War is not to be considered by you in any respect in arriving at your verdict in this case. You must be just to the plaintiff and equally just to the Government. As upright men charged under oath with the responsible duty of assisting the Court in the administration of justice, you will put aside all

sympathy and sentiment and look steadfastly to the law and the evidence in the case and return into court such a verdict as is warranted by the law and the evidence.

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror upon entering the jury room to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to re- [101] cede from an announced position if and when shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom—not in the opinions any of you may hold as you retire.

Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

You are instructed that if the Judge has said or done anything which has suggested to you that he is inclined to favor the claim or position of either party, you will not suffer yourselves to be influ-

enced by any such suggestion. I have not expressed nor intended to express, nor have I intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credulity; what facts are or are not established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you disregard it. It is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement, if you can do so without violence to your individual judgment. To each of you I [102] would say that you must decide the case for yourself; but you do so only after a consideration of the case with your fellow-jurors; and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in one way on any question submitted to you by the single fact that a majority of the jurors or any of them favor such a deliberation or decision. In other words, you should not surrender your honest conviction concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

Upon retiring to the jury room you will select one of your number to act as foreman who will preside over your deliberations and who will sign the verdict to which you all agree.

This is a civil action. As soon as all of you shall have agreed upon a verdict, you shall have it signed by your foreman and dated, and then you shall return into this courtroom.

You should not be concerned in your deliberations at all with any compensation of the attorney. That is entirely a matter for the Court, in the event any compensation were allowed.

Mr. Dillon: Exception to the last instruction, your Honor.

(Whereupon, at 2:45 o'clock p. m., the jury retired to the jury room for their deliberations.)

[Endorsed]: Filed Apr. 22, 1942. [103]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10027

Appeal from the U. S. District Court, Southern
District of California, Central Division,
No. 1100-O'C-Civil.

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

STIPULATION FOR SUPPLEMENTAL TRAN-
SCRIPT OF RECORD ON APPEAL (Rule 19)

Whereas, pursuant to stipulation of the parties, and an order of the U. S. District Court, Southern District of California, Central Division, the reporter has prepared a supplemental Transcript of the record of the trial of the above-entitled cause, being a portion omitted from the Transcript of Record filed with the Clerk of the above-entitled Circuit Court of Appeals, being the instructions of the trial judge to the jury in said cause, and

Whereas, in printing the Transcript of Record, parts of the deposition of Richard B. Posey was omitted therefrom, which said parts were introduced into evidence and do not appear in said Transcript (R. 90-107), and

Whereas, the aforesaid Jury Instructions and the parts of the deposition of said Posey so omitted,

are material and necessary for the consideration of the appeal, and the Appellee considers the omission thereof to be of substantial prejudice to her, upon this appeal, and that without such parts, a material part of the record has not been printed,

Now, Therefore, It Is Hereby Stipulated by and between the parties that the Clerk shall cause to be printed a Supplemental Transcript of the record, to include

- (1) The trial court's instructions to the jury;
and
- (2) The entire deposition of Richard B. Posey, including the exhibits attached thereto or referred to in said deposition, other than those portions heretofore incorporated in and printed in the transcript of Record in this cause, pages 90 to 107, inclusive.

It Is Further Stipulated that the above-entitled Circuit Court of Appeals shall consider that the entire jury instructions, so included, were given to the Jury, without objection, and that the entire deposition of said Posey, and the exhibits attached thereto or referred to in said deposition, were introduced in evidence, without objection, except as to those portions withdrawn in open Court, during the trial of said cause, and except as to those portions thereof as to which objections were made thereto, during the trial of said cause, as set forth in the Transcript of Record in this cause, pages 90 to 107, inclusive. And that the Transcript of Record now on file and said additional parts of the

record, as aforesaid, to be printed as a supplemental transcript, shall be and are hereby designated as the parts of the record necessary for the consideration of the appeal herein.

Dated: May 6, 1942.

WM. FLEET PALMER

U. S. Attorney

DANIEL DILLON

Atty., Department of Justice

Attorneys for Appellant

SYLVESTER HOFFMAN

Attorney for Appellee

[Endorsed]: Filed May 11, 1942. Paul P. O'Brien,
Clerk.

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 1100-B-Civil

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Washington, D. C.

Thursday, May 15, 1941.

DEPOSITION OF RICHARD B. POSEY,

a witness of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein Rosetta

Alice Kelley is the plaintiff and the United States of America is the defendant, pending in the District Court of the United States in and for the Southern District of California, Central Division, pursuant to the notice hereto annexed, before Lloyd L. Harkins, a notary public in and for the District of Columbia, at Room 304, Columbian Building, 416 Fifth Street, N.W., Washington, D. C., at 10 o'clock a. m., on Thursday, May 15, 1941.

Appearances

On behalf of the Plaintiff:

Warren E. Miller

On behalf of the Defendant:

William T. Becker [2*]

RICHARD B. POSEY,

a witness of lawful age, was thereupon duly sworn, and, being examined by counsel, testified as follows:

Direct Examination

By Mr. Becker:

Q. Will you state your name, please?

A. Richard B. Posey.

Q. What is your business or profession, Mr. Posey?

A. I am an employee of the Government, the Veterans Administration.

[*Page numbering appearing at top of page of original Reporter's Transcript.]

(Deposition of Richard B. Posey.)

Q. How long have you been employed by the Veterans Administration?

A. With the Veterans Administration and predecessors since June 10, 1918.

Q. In what branch or bureau of the Veterans Administration are you employed?

A. I am with the Insurance Service, have always been in the Insurance Service.

Q. In what capacity are you employed in the Insurance Service, Mr. Posey?

A. I am advisor on insurance matters to the Director of Insurance, and anyone in the Bureau, and folks outside the Veterans Administration, the various departments. I frequently advise the folks in the War Department, the Navy Department, Coast Guard.

Q. And pursuant to a notice to take this deposition of H. L. McCoy, Director of Insurance of the Veterans Administration, or such officer or employee as he may designate, were you designated by Mr. McCoy to represent the Director of Insurance [3] in the giving of this deposition? A. I was.

Q. Now, during your long service with the Veterans Administration have you become familiar with the regulations and procedure, both written and those formed by administrative practice, in regard to the reinstatement and the granting of policies of insurance? A. I have.

Q. Subsequent to July 2, 1927, what was necessary for a man to secure a policy of United States

(Deposition of Richard B. Posey.)

Government life insurance, his policy having previously lapsed after his discharge from the military service?

Mr. Miller: I object to that for the reason that it is a matter of law, and the law speaks for itself.

A. From July 2, 1927, there was no yearly renewable term insurance reinstated, but on May 29, 1928, an act was passed, Section 310 of the World War Veterans Act, as amended, which provided for granting insurance to those who were ever entitled or who had ever applied for yearly renewable term insurance while in the Service. The right to insurance under this was conditioned upon proof of good health, satisfactory to the Administrator.

Mr. Miller: I move to strike the answer for the reason assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, under the procedure of the Veterans Administration, when a man applies for compensation what office is that application for compensation filed in?

A. Usually the regional office or facility in the field. [4]

Q. Now, assuming that the man was a resident, at the time he applied for compensation, of California, where would the application be sent?

A. Either Los Angeles or San Francisco.

Q. Would the Insurance Service of the central office have any knowledge as to this application for compensation?

(Deposition of Richard B. Posey.)

A. They would eventually get the number, C number assigned in that case, but they might not receive the files for a long period of time. They might remain in the field indefinitely.

Mr. Miller: I move to strike that portion of the answer starting with, "but they might not receive the files for a long period of time. They might remain in the field indefinitely," for the reason that it is highly speculative.

By Mr. Becker:

Q. Mr. Posey, what is the generally accepted definition of good health?

Mr. Miller: I object to the question as vague, indefinite, and uncertain.

Mr. Becker: I shall reframe the question.

By Mr. Becker:

Q. Mr. Posey, what is the generally accepted definition of good health, as interpreted by the Insurance Service of the Veterans Administration?

Mr. Miller: I object to the question for the reason that it is irrelevant, immaterial, and incompetent.

A. We have a definition by regulation which is rather long, but the common-sense everyday definition is what it means: free from injury or disease.

Mr. Miller: I move to strike the answer for the reason [5] assigned in the objection.

By Mr. Becker:

Q. And then, under the regulations or procedure of the Veterans Administration, before a man would

(Deposition of Richard B. Posey.)

be entitled to have United States Government life insurance granted to him subsequently to July 2, 1927, under the provisions of Section 310 he would have had to have been free from injury or disease at the time the insurance was granted?

Mr. Miller: I object to the question as leading.

A. He would have to have been in good health.

Mr. Miller: I move to strike the answer for the reason assigned in the objection.

By Mr. Becker:

Q. Is there a written or printed form of application that the Veterans Administration uses for the securing of this insurance? A. There is.

Mr. Becker: Mark this for identification, Defendant's Exhibit 1.

(Photostatic copy of document, consisting of four sheets, was marked Defendant's Exhibit No. 1 for identification.)

[Printer's Note: Defendant's Exhibit No. 1 is here omitted as it is already set out as Defendant's Exhibit A at page 58 of this printed record.]

By Mr. Becker:

Q. I hand you a photostat and ask you if you can identify that, as to what it is.

A. This is an application for insurance, on Form 739.

Mr. Becker: I now introduce into evidence photostat of application for United States Government life insurance, dated March 15, 1932, and signed by

(Deposition of Richard B. Posey.)

Thomas Joseph Kelley, the original [6] of which is believed to be in the possession of the United States Attorney and will be substituted for this photostat when the deposition is read in court.

Mr. Miller: I object for the reason that the same is irrelevant, incompetent, and immaterial, and has not been properly identified.

By Mr. Becker:

Q. Mr. Posey, I hand you this application and ask if the application contains a question relative to the filing of a claim for compensation.

Mr. Miller: I object to the question for the reason that the question is based on incompetent evidence; and at this time, in order to save the costs of taking this deposition, I ask that this be considered a continuing objection to all further questions asked by counsel for the defendant based on this record.

I further object to the question for the reason that the record, if admissible, speaks for itself.

A. It does have such a question.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Would you read into the record the question and the answer of the applicant for the insurance to that question?

Mr. Miller: I object: irrelevant, immaterial, incompetent, not the best evidence, hearsay.

A. The question is No. 13 and is subdivided.

(Deposition of Richard B. Posey.)

First, "Have you ever applied for Government compensation?" The answer is "No." [7]

"Training allowance?" The answer is "No."

"Government insurance?" The answer is "No."

"Pension?" The answer is "No."

"If so, give reference numbers." The answer to that is three X's.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, assuming that as a fact the applicant for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service, under its practice and procedure, have made further inquiry before this insurance was granted, to determine what if any disability that claim was based upon?

Mr. Miller: I object for the reason that the question is vague, indefinite, and uncertain; for the further reason that this witness was not engaged in work at the time that the alleged application, which is marked Defendant's Exhibit No. 1, was acted upon; and that the question asks for hearsay testimony because of the fact that this witness is being asked what someone else would have done or would not have done so far as making inquiry is concerned; and that it is impossible for this witness to state what someone else would have done or would not have done, as asked in the question. All he can give is his idea of what somebody else might or might not do.

(Deposition of Richard B. Posey.)

Mr. Becker: Would you reread the question, please?

(The pending question, as above recorded, was read aloud by the reporter.)

Mr. Miller: And the further objection is made for the [8] reason that the question is too speculative.

Mr. Becker: Let me rephrase that question, as follows:

Q. Mr. Posey, assuming that as a fact the applicant for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service have been required, under its practice and procedure, to make further inquiry before this insurance was granted, to determine what if any disability that claim was based upon?

Mr. Miller: I object to this question also, for the reasons assigned in the objection to the previous question, which will not here be repeated, for the sake of brevity.

A. No.

Mr. Miller: I move to strike the answer out for the reasons assigned in the objection.

By Mr. Becker:

Q. Did you want to make some further explanation of that answer?

A. I would say that the Insurance Service was authorized and instructed to rely upon the answers of the insured in his application.

(Deposition of Richard B. Posey.)

Mr. Miller: I move to strike the answer out for the reasons assigned in the objection.

By Mr. Becker:

Q. Now, Mr. Posey, on the application for insurance are there any questions contained therein relative to any diseases or disabilities from which this insured may have been suffering? If so, would you kindly read into the deposition the question and the insured's answer?

Mr. Miller: I object for the reason previously assigned [9] and for the further reason that the question is too speculative.

A. The first question, 21, under the title of "Applicant's Own Statement," on the medical examination, is, "What operations have you had? Describe fully, giving dates, also name and address of attending surgeon." The answer is, "Hemorrhoidectomy September, 1920. Complet"—no "e" on it—"Complet Recovery. Dr. Guy Cochran, Los Angeles."

Next question is No. 22, "Have you ever used wines or liquors to excess?" The answer is "No."

Question 23, "Have you ever used opium, morphine, cocaine, or other habit-forming drugs?" The answer is "No."

"What is your occupation?" Railroad fireman.

25, "Are you now in good health?" Answer, "Yes."

27, "Have you been ill, or contracted any disease, or suffered any injury, or been prevented by rea-

(Deposition of Richard B. Posey.)

son of ill health from attending your usual occupation, or consulted a physician in regard to your health, since date of discharge? (Answer 'Yes' or 'No.')

The answer is "Yes." "If so, give dates and full particulars, including the name and address of physician." The answer is "Hemorrhoidectomy September 1920. No after trouble. See above." He has this same answer above.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Now, are there any further questions on that application form relative to whether or not this applicant had suffered from any specific disease or diseases?

Mr. Miller: I object to the question for the reason previously given, and further for the reason that the question [10] is too speculative and calls for the conclusion of the witness.

A. Yes.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. What are the questions and answers as shown on the application form?

Mr. Miller: Same objection.

A. Question 40, "Has applicant ever had syphilis, gout, or rheumatism? (State which)." Answer is "No."

(Deposition of Richard B. Posey.)

Question 41, "Any defects in the sight or hearing?" The answer is "No."

42, "Any deformity or departure from normal in any respect? No."

43, "Has the applicant lost an eye, hand or arm,"——

Mr. Miller: I move to strike the answer for the reasons heretofore assigned.

By Mr. Becker:

Q. Mr. Posey, referring back to the second page of the application, under "Applicant's Own Statement," does the application there show any statements by the insured as to whether or not he has suffered from any particular disease or diseases?

Mr. Miller: I object to the question for the reason previously given, and further for the reason that the question is too speculative and calls for the conclusion of the witness.

A. Question 26.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection. [11]

By Mr. Becker:

Q. Would you read question 26 and the applicant's answer thereto into the record, please?

Mr. Miller: I object to the question for the reason previously given.

A. "Have you ever been treated for any disease of brain or nerves?" Answer, "No."

"Throat or lungs?" Answer, "No."

"Heart or blood vessels?" Answer, "No."

(Deposition of Richard B. Posey.)

“Stomach, liver, intestines?” Answer, “No.”

“Kidney or bladder?” Answer, “No.”

“Genito-urinary organs?” Answer, “No.”

“Skin?” Answer, “No.”

“Glands?” Answer, “No.”

“Ear or Eye?” Answer, “No.”

“Bones?” Answer is “No.” That is the end of the answer to that question.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, in your experience in the insurance service of the Veterans Administration have you, as a layman, learned what the disease of aortitis is?

Mr. Miller: I object to the question: irrelevant, immaterial, incompetent, and this witness has not been shown to have sufficient experience to answer the question. It is a question of medicine.

A. I have known that it was a heart disability a long time before I came to the Bureau. I was with a private company [12] in Indianapolis, Indiana, and I knew that it was a heart disability.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection and for the further grounds that it is hearsay.

By Mr. Becker:

Q. By “private company” you mean a private insurance company?

Mr. Miller: Same objection.

(Deposition of Richard B. Posey.)

A. Yes.

Mr. Miller: I move to strike the answer for the reasons assigned.

By Mr. Becker:

Q. Mr. Posey, if it is shown by the records and on the trial of this case that this insured was examined on October 28, 1931, and at that time was diagnosed as suffering from "aortitis, chronic mild, with good cardiac tolerance," and had he made that known to the Veterans Administration in this application for insurance in 1932, would this insurance, under the regulation and procedure of the Veterans Administration, have been granted?

Mr. Miller: I object to the question.

By Mr. Becker:

Q. Or could it have been granted, under the regulation and procedure of the Veterans Administration?

Mr. Miller: I object to the question, first, for the reason that it is speculative; second, for the reason that no knowledge on the part of the insured appears as of record as to what he was suffering from or what the result of his examination [13] was, if he was examined on October 28, 1931; for the further reason that the record does not show that he was so examined on such date; further, for the reason that the witness is being asked a question as to what somebody else would have done under certain circumstances, and the best evidence would be the tes-

(Deposition of Richard B. Posey.)

timony of the person who approved this insurance application, Dr. McIntyre; further, for the reason that the question calls for hearsay testimony, highly speculative testimony; and if there are any regulations that are applicable, they would be the best evidence, rather than the testimony of this witness, as to what the procedure would be.

A. I would say there was no one authorized to approve an application where it was shown that the man had a heart disability.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, referring again to the application for insurance, by whom was that application approved?

Mr. Miller: Same objection previously to the whole line of testimony based on the evidence obtained in this Defendant's Exhibit No. 1; and when the words "Same objection" appear to the questions heretofore asked, that is what is meant.

Mr. Becker: Let me ask this question:

Q. Would you read into the record the stamp which appears on the last page of the application, showing that it was acceptable under Section 310?

Mr. Miller: I object to the question. Same objection.

A. The application shows a stamp, "Acceptable under Sec- [14] tion 310. By Dr. A. J. McIntyre,

(Deposition of Richard B. Posey.)

Insurance Medical Section. Date 4/8/32," initialed by Dr. McKenzie.

By Mr. Becker:

Q. Were you acquainted with both Dr. McIntyre and Dr. McKenzie, Mr. Posey?

Mr. Miller: I object to the question as immaterial, irrelevant, and incompetent.

A. Yes, sir.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Do you know whether Dr. McIntyre and Dr. McKenzie are now living or dead?

Mr. Miller: I object to the question.

A. They are both dead, been for a year or two.

Mr. Miller: I move to strike the answer.

By Mr. Becker:

Q. Assuming, Mr. Posey, that the applicant on October 30, 1931, was given a Wassermann test and showed a positive Wassermann, have you, in your experience with the Veterans Administration and as a layman, learned what a positive Wassermann indicates?

A. Yes. It indicates syphilis.

Q. Under the regulation and procedure of the Veterans Administration can a man who is shown to have had a positive Wassermann be granted insurance?

Mr. Miller: I object to the question for the rea-

(Deposition of Richard B. Posey.)

son that this witness is now being asked a question as to what some doctor would or would not do in passing a man for insurance, and clearly [15] he is being asked a question as to whether Drs. McIntyre or McKenzie would pass a person under these circumstances. Their testimony would be the best evidence on this point, and any regulations of the Veterans Administration would be the best evidence. In the absence of laying the proper foundation it is respectfully submitted to the Court that this witness' testimony is not admissible on this point, being hearsay, highly speculative, and otherwise, as apparent, irrelevant, immaterial, and incompetent.

A. I would say that no one was authorized to approve an application if it was known that the applicant had had syphilis at any time.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, are the Veterans Administration regulations and practice and procedure relative to the reinstatement or granting of insurance all in printed form, or have they been built up by custom?

Mr. Miller: Same objection.

A. We have regulations in printed form, but we also have practice that has grown up that is not in printed form.

Mr. Miller: I move to strike the answer.

(Deposition of Richard B. Posey.)

By Mr. Becker:

Q. And the practice as to the granting of insurance, is it or is it not almost entirely just a practice that has been built up and of which no printed regulations have been promulgated?

Mr. Miller: Same objection.

A. The only regulation is the one that defines good health— [16] I forget the number of that—but the practice has been to follow the authority in the law for the granting of insurance; and good health has been used to mean in the Bureau exactly what it says, that a man has no illness or disabilities.

Mr. Miller: I move to strike the answer.

By Mr. Becker:

Q. Then, the practice is that if a man has any illness or disability no insurance may be granted to him, under Section 310?

Mr. Miller: I object to the question as leading and for the reasons previously assigned.

A. There is no authority for granting the insurance, and any that is granted would be purely an error.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

Mr. Becker: You may examine.

Cross Examination

By Mr. Miller:

Q. Mr. Posey, a man's condition at the time of making application for insurance is the criterion

(Deposition of Richard B. Posey.)

which determines whether or not it shall be granted to him, isn't it?

Mr. Becker: I want to object to the question unless it is confined to an application for reinstatement or granting of insurance under the provisions of Section 310 of the War Risk Insurance Act, it being admitted that there is a Section 304 which controls the granting of insurance to men suffering from a service-connected disability.

A. I think the criterion is the condition the man is in when he applies, but in determining that condition it is a well- [17] known practice among the medical folks generally that the history of the man's life and what illnesses he has had plays a large part in determining that present condition.

Mr. Miller: Without in any way waiving the objections made on direct examination, the following questions are asked this witness, should the objections made on direct examination not be sustained by the Court.

By Mr. Miller:

Q. Did you ever personally approve an application for reinstatement of insurance?

A. I don't believe I have, but I have been consulted on various times about the forms and what they should require and as to whether they ought to go into substandard business and take some of these folks, and we have discussed all of those things. Both of those doctors were calling on me for information.

(Deposition of Richard B. Posey.)

Mr. Miller: I move to strike that portion of the witness' answer after the word, "have" as not responsive.

By Mr. Miller:

Q. How do you know Dr. McKenzie is dead, if you know, other than from what someone told you?

A. I believe that my knowledge comes from a newspaper notice of death. That is my recollection.

Q. How do you know that Dr. McIntyre is dead?

A. I attended Dr. McIntyre's funeral.

Q. When you stated that no printed regulation has been promulgated, do you mean that no type-written regulation or memorandum has been promulgated for the definition of good health, or you have just referred to the printed regulations promulgated by the administration? [18]

A. There is printed in the regulations or procedure somewhere a definition of good health. I forget just where it is. I would have to look it up if you want to know it exactly.

Q. Would it be possible for a person who had had syphilis and this condition to have cleared up to be granted insurance under Section 310?

A. It could be possible if it wasn't known, because the examination made many years afterwards might not disclose it.

Q. Many people have syphilis and don't know it, don't they?

A. Well, I think that is true. I believe that is true.

(Deposition of Richard B. Posey.)

Q. And when a man is examined by the Veterans Bureau, Doctor, based on your experience, do you know whether or not he is told the result of the examination?

A. I wouldn't like to say as to the practice. I know that in many cases they do tell them, especially where they know them real well, but I would not like to state what the practice is, because that is too extensive.

Q. Then, you are not in a position to state what the custom was at the place and time this man was examined?

A. No, I don't believe I could.

Q. Do you know what regulations were issued by the Veterans Administration with respect to informing claimants as to the results of their examinations by the doctors who made them, or by anyone else?

Mr. Becker: Objected to: irrelevant and immaterial, and it is a matter of law, not regulation.

A. We have regulations in regard to what information will be given a veteran, but I have never gone into it because it is [19] of no importance to our insurance.

By Mr. Miller:

Q. That is in the medical service?

A. Yes. More a matter of what is good for the veteran and what is good for the public.

Q. Do you know that in making examinations the typewritten report of the examination isn't com-

(Deposition of Richard B. Posey.)

pleted until after the examination and after the veteran has left the presence of the examiner?

A. You mean an examination, now, for insurance?

Q. An examination such as was made here on October 28, 1931.

A. I would say that ordinarily they are filled out before the man signs them. That is the rule. They should be.

Q. Did this man sign the examination of October 28, 1931?

A. Pardon me just a minute. You are speaking of the application?

Q. No. The October one, October 28, 1931.

Mr. Becker: I object to the question unless the examination or photostat thereof is exhibited to the witness, unless he has personal knowledge of it.

Mr. Miller: The last page.

Mr. Becker: Down at the bottom of the last page.

The Witness: No. I am looking at this. This is not an application for insurance (indicating).

Mr. Becker: He is talking about examination.

Mr. Miller: Examination.

The Witness: Well, this is signed by Thomas J. Kelley, the same signature that is on the other application. [20]

By Mr. Miller:

Q. What appears just over Mr. Kelley's signature, after the words, "Statement by Claimant"?

(Deposition of Richard B. Posey.)

Mr. Becker: Just a minute now. Objected to as irrelevant, immaterial, unless the examination report referred to is introduced into evidence at this time.

Mr. Miller: You may answer.

A. "Statement by Claimant," you want?

By Mr. Miller:

Q. Yes.

A. "My answers to question 9 have been read to me, and I hereby certify that the complaints therein recorded are all that I am suffering from to my knowledge."

Pardon me. This part in parentheses, do you want me to read that? It is awfully hard to read. Just "Examining physician will read." Do you want me to read that?

Q. Yes. "The examining physician will read complaints noted in answer to question 9 before the Claimant's signature is affixed"?

A. That is correct.

Q. And now will you read question 9 and the answers, which is referred to in that?

Mr. Becker: The same objection as to the previous question.

By Mr. Miller:

Q. "Present complaint."

A. (reading) Question 9. Present complaint. Subjective symptoms. Not diagnosed. See bottom of fourth page—I think. [21]

Q. Yes.

(Deposition of Richard B. Posey.)

A. (reading) This form for claimant's certification of fullness of answer to question 9. The examiner will acquaint the claimant with the requirement prior to noting complaints. Backache. That is the answer: backache.

Q. The answer to 9 is "Backache. Vision poor"?

A. "Backache. Vision poor."

Q. Yes. So all this claimant certified by his signature was what he was complaining about, on that; isn't that correct?

A. Well, Mr. Miller, now I wouldn't answer that because I haven't read all the form. Now, that form, I didn't go over that form until just now that you showed it to me, see.

Q. Well, what I mean is, this is all he said.

A. Sure.

Q. That's all he said was 9, see: "My answers to question 9." (exhibiting a document to the witness)

A. Well, that is calling for a conclusion.

Mr. Becker: I object to the question as calling for an opinion.

A. I'd say that his certification refers to question 9.

By Mr. Miller:

Q. Now, are you familiar with the procedure with regard to the assigning of C numbers or claim numbers, Mr. Posey?

A. Yes, fairly so.

Q. Where was the number assigned in this case?

(Deposition of Richard B. Posey.)

A. I am not positive, but I assume it was assigned in the regional office.

Q. What is the procedure, or will you describe the procedure when a man makes an application for insurance, from the [22] time the number is first assigned to the claim, showing where the number is recorded and what is done with regard to the number?

Mr. Becker: Wait a minute. Objected to as irrelevant and immaterial, for the further reason that the C number may be assigned in connection with compensation and never come to the attention of the insurance service. Now you may answer.

A. Off the record, I want to be sure, Mr. Miller.

By Mr. Miller:

Q. Sure.

A. You are asking about a C number now? You are not talking about a claim for insurance benefits?

Q. No. C number.

A. Just the C number?

Q. C number on an application for compensation.

A. Well, the C numbers for compensation are frequently supplied in the regional office. Blocks of numbers are assigned to various offices, and they assign the C numbers; and, as I stated in the first part of the examination here, those numbers reach Washington—numbers do—and show that they have a C number, but the file itself might not reach Washington for a long while.

(Deposition of Richard B. Posey.)

Q. There is a master index card in Washington showing the names of the veterans for the C numbers? A. There is, yes, sir.

Q. For each C number, I had better say?

A. Yes, sir.

Q. And that information under the regulations is furnished to Washington—by “that information” I mean the [23] proper C number for a given name—promptly, is it not?

A. I should say so, yes.

Q. At the time this application for insurance in this case was approved, Defendant’s Exhibit No. 1, under the regulations there should have been an index card with this C number, 1783258, in the Washington office?

A. Yes. I am positive that that was a matter of record in the Washington office.

Q. The insurance medical section was in the Washington office at the time this application was located in the Washington office? A. Yes.

Q. What was the practice of the insurance service with respect to looking at this index card with the name of the applicant for insurance to determine whether or not he had applied for compensation?

Mr. Becker: I object to the question as irrelevant and immaterial, the question here in this case being whether or not the insured in his application made false and fraudulent statements.

(Deposition of Richard B. Posey.)

Mr. Miller: Will you read the question?

(The pending question was read aloud by the reporter.)

Mr. Miller: Previously applied for compensation.

A. It has never been the practice, was not then, to look into compensation files to find out what was the matter with a man if his health was good and the application was otherwise regular, which showed him to be in good health.

By Mr. Miller:

Q. By "otherwise regular" you mean the examining physician [24] whose report is attached to the application showed no bad health?

A. Showed no condition that would prevent him from being in good health.

Q. Well now, what——

A. Could I go a little further?

Q. Yes, surely.

A. It appears in this particular case that they did not draw the C file.

Q. Why do you say that?

A. There is no number—wait a minute. Pardon me. I am wrong on that. I am wrong. There is a C number on here. Now, whether that was put on afterwards or not, I don't know. Now, I can put that answer in, because I remember seeing the case go through, and from my own knowledge of the case I don't think they ever drew the C file. That is my impression, but I wouldn't say positively.

(Deposition of Richard B. Posey.)

Q. Yes. Defendant's Exhibit No. 1 for identification, consisting of four sheets, has on the first sheet C number 1783258, does it not?

A. It does.

Q. Now, do you know when that number was put on the application?

A. I do not, but it has all the appearances of having been put on in pencil after this application was received. I don't know when.

Q. It might have been put on there before April 5, 1932, might it not? A. Very likely.

Mr. Becker: I move to strike all of that as irrelevant [25] and immaterial.

By Mr. Miller:

Q. Now, the practice of the Veterans Administration is to maintain what is known as a "Central Office Dummy" File on all compensation cases, isn't it, Mr. Posey?

A. I would say on all C files.

Q. Yes, on C files.

A. Whether or not it was compensation or what-not.

Q. Yes. And this central office C file contains reports of physical examinations?

A. Sometimes.

Q. Carbons? A. Sometimes; not always.

Q. It also usually contains the ratings assigned by the adjudication officers?

A. My answer to that would be the same, that it sometimes contains quite a set of them, and some-

(Deposition of Richard B. Posey.)

times it won't have a single one, so it is not a file that we can depend on very well.

Mr. Becker: I object to the question and move to strike the answer on the ground that it is irrelevant and immaterial.

By Mr. Miller:

Q. But under the procedure the central office dummy file is supposed to contain a duplicate of the physical examination reports and the ratings, is it not?

A. Mr. Miller, I am not positive of that, that there is any regulation requiring that. I must say that you are getting into the compensation features now, and it is something I don't pay a lot of attention to.

Q. But you know of your own knowledge, and by having [26] handled these central office dummy files, that they do often contain carbons of the ratings made for compensation purposes and carbons of physical examination reports?

A. I'd say that is true: they do often contain them.

Q. And if the insurance medical section had looked at the "Central Office Dummy File" in the instant case, they would have seen whatever was in there as to ratings or physical examination reports?

Mr. Becker: Just a minute. Objected to.

A. Yes.

Mr. Becker: As irrelevant and immaterial and

(Deposition of Richard B. Posey.)

there being no showing that there was a duty on behalf of the insurance service to investigate or look into the compensation file of this veteran.

A. I would answer that, Mr. Miller, by saying that I question very much whether a dummy file had been made up in this case at the time this application for insurance came in.

By Mr. Miller:

Q. Why do you say that in this particular case, Mr. Posey?

A. Because the application for insurance followed so quickly after the claim for disability allowance. It was only a few months after, wasn't it?

Q. This one here is 4/5/32.

Mr. Becker: August 31, 1931, was the date of the claim.

By Mr. Miller:

Q. Well, assuming that the date of this man's claim, at which time the compensation number of C 1783258 was assigned to this case, was August 31, 1931, and this application for reinstatement of insurance was approved April 5, 1932, over seven [27] months later, would it not be possible that the rating and copy of physical examination report was in the central office dummy file on the latter date: that is, April 5, '32? Is it possible?

Mr. Becker: Just a minute, Mr. Posey. Objected to as irrelevant and immaterial and calling for speculation on the part of the witness.

A. I would say it is quite possible, and that if

(Deposition of Richard B. Posey.)

the award of benefits had been made out there it was quite probable it had been received by this time.

By Mr. Miller:

Q. Now, Mr. Posey, is there any way to tell, from the central office records here in Washington, as to when the central office dummy file in this case was made up? Or do you know?

A. You could from the C file, but I don't know whether we could tell when the central office dummy was made up from the records here at Washington. I am not positive as to that. I could tell you when C numbers are assigned where they are assigned in Washington; I can give you the very day.

Q. Can you state, Mr. Posey, when the central office first received information that C 1783258 had been assigned to the case of Thomas J. Kelley?

Mr. Becker: Objection as irrelevant and immaterial.

A. I cannot state when it was assigned, but it was a matter of record.

By Mr. Miller:

Q. In the central office?

A. In the central office when the application for insurance was received on March 29, 1932.

Q. Where is the central office dummy file in this case? [28]

A. I rather think it was with the C file in the field when this trial was about to take place.

(Deposition of Richard B. Posey.)

Q. And by that you mean with the Government attorney in charge of the defense of this suit?

A. I'd say yes.

Q. That is the practice, to send it there?

A. It is.

Q. When suit is filed, so all records will be there?

A. No, no. Practice for us to send it to the Department of Justice, to send all these files to the Department of Justice. They send them to their attorneys.

Q. Based on your experience in the Veterans Administration over all these years, can you state whether or not the central office dummy file or the C file in this case will show when the central office dummy file was first prepared?

A. I am not positive, but I rather think it could be ascertained, with those two files, when it was made up.

Q. Were there ways for disabled World War veterans to reinstate insurance other than under Section 310 of the World War Veterans Act, Mr. Posey, and what were they?

A. Well, Section 310 doesn't authorize any reinstatement. It authorizes the granting of new insurance.

Q. O.K. Well, then, let me repeat the question this way: Was it possible for disabled World War veterans to obtain United States Government life insurance in other manners than as provided in Sec-

(Deposition of Richard B. Posey.)

tion 310 of the World War Veterans Act of 1924, as amended?

Mr. Becker: Objected to as irrelevant and immaterial, it being a matter of law and admitted that under Section 304 of [29] the World War Veterans Act of 1924, as amended, World War veterans suffering from a service-connected disability of a degree less than permanent and total were entitled to a reinstatement of their insurance.

A. I would state that prior to July 2, 1927, they could reinstate yearly renewable term insurance under Section 304, the provisions of which are in that section, and after that period a man could reinstate a Government life-insurance policy that had lapsed, provided it hadn't been lapsed longer than two years.

By Mr. Miller:

Q. You mean under Section 304?

A. Under Section 304. And as has been stated by counsel, he only had to show that his disability that prevented him from being a good risk was service-connected and pay all premiums in arrears with interest, and also show that he was not totally and permanently disabled.

Q. Do you, Mr. Posey, know whether this veteran was suffering from a service-connected disability at the time he applied for his United States Government life insurance?

Mr. Becker: Objected to as irrelevant and immaterial, the policy having been granted under the

(Deposition of Richard B. Posey.)

provisions of Section 310 of the World War Veterans Act of 1924, as amended by the Act of May 29, 1928.

A. I don't know, Mr. Miller, whether or not what disability he had was connected with his service or not. I haven't looked into that part of it.

By Mr. Miller:

Q. Who determines under what section of the law the insured [30] is reinstated, whether under Section 304 or Section 310, the insured or the Veterans Bureau officials?

A. As I stated before, he doesn't reinstate insurance under 310.

Q. Well, I beg your pardon.

A. He buys new insurance under that, and he has to show good health and pay the premiums. That's all there is to it. There isn't a question of any arrears. It's a question of current premiums; that's all. Under 304 it would be necessary for some board having charge of the compensation feature to ascertain whether or not he had a service-connected disability.

Q. Then it would be the Bureau's—that is, the Government's—representative who would determine whether he would be entitled to apply for insurance under Section 304 or not?

A. He can't apply for insurance now under 304, not since July 2, '27.

Q. I see.

(Deposition of Richard B. Posey.)

A. He can't apply for reinstatement of term insurance any more; yearly renewable term, I should say.

Q. But could he apply for new insurance after that, in March, 1932, under Section 304?

A. No, sir; he could not apply for any insurance under 304 at that time unless he had a converted policy that had been lapsed for less than two years, and he could apply for reinstatement of such a policy.

Q. In order to apply for United States Government life insurance it was necessary for Thomas Joseph Kelley to have first had term insurance, was it not?

A. No. If he ever had the right to apply or had applied [31] or been granted yearly renewable term insurance, he had the right to apply for insurance under Section 310.

Q. It was necessary, then, first to determine whether he was eligible to have applied for war risk term insurance prior to May 29, 1928, in order for him to have been granted United States Government life insurance in 1932?

Mr. Becker: Objected to as irrelevant and immaterial.

A. Not in his case because I believe, yes, he had yearly renewable term insurance while in the service.

By Mr. Miller:

Q. But you had to check that fact?

A. Oh, yes.

(Deposition of Richard B. Posey.)

Q. Before granting his insurance?

A. We checked the fact that he was entitled to it.

Q. And in checking that, it was the policy to look at the card index to determine whether he had previously had a term policy? A. Yes.

Q. And this index card showed that he did previously have a term policy? A. He did.

Q. And what evidence is there on this application for reinstatement of March, 1932, which indicates that?

A. Well, on the first page of the application there is a notation "T 2015048," which is the term application number.

Q. And the index card which shows that T number also shows his C number, does it not?

A. Yes.

Q. Then, someone must have looked at that card and determined [32] mined that he had a C number before this application for insurance was approved?

Mr. Becker: Objected to as irrelevant and immaterial.

A. I feel they knew that he had a C number. It is on the application; it shows right on here (indicating).

By Mr. Miller:

Q. And that must have been put there before the application was approved under those circumstances, don't you think? A. I'd think it was.

Q. Now, Doctor, did the examination of Dr. Lenker, which appears on the third page of De-

(Deposition of Richard B. Posey.)

fendant's Exhibit 1, dated March 15, 1932, indicate any evidence of aortitis?

Mr. Becker: Objected to as irrelevant and immaterial, and the examination report which is in evidence speaks for itself and is the best evidence.

A. I can't find any answers that indicate he had any heart disability.

By Mr. Miller:

Q. Then, assuming the facts shown on the examination made by Dr. Lenker to be true, the applicant Kelley was then in good health, was he not?

A. I'd say yes, he was approved on that basis.

Q. Was there any evidence before the Veterans Administration at the time this application for insurance was approved which showed that this veteran knew he had had syphilis, or do you know?

Mr. Becker: Objected to.

A. I couldn't answer that question because I haven't had access to the other files. [33]

By Mr. Miller:

Q. Was there any evidence before the Veterans Administration at the time this application was approved that this veteran had knowledge of the fact that he had previously had aortitis, or do you know?

Mr. Becker: This question is objected to because it is asking this witness to testify as to the knowledge of the insured and asking him to express an opinion and to speculate.

A. I don't know.

Mr. Miller: That is all.

(Deposition of Richard B. Posey.)

Redirect Examination

By Mr. Becker:

Q. Just one more question, Mr. Posey. Under the practice of the Veterans Administration, had this insured at the time of his application stated that he was suffering from aortitis or had been suffering from aortitis and had in October, 1931, had a positive Wassermann, even with the examination of Dr. Lenker showing him to be a good risk and in good health at the time of his examination, could this insurance have been granted under the practice and procedure of the Veterans Administration without further inquiry to determine his true condition?

Mr. Miller: I object to the question, first, on the ground that this question is leading; second, that it is argumentative; third, that it is irrelevant, immaterial, and incompetent in that knowledge of these conditions on the part of the insured is essential in order to establish fraud, and the question does not embody that very important phase of this case; further for the reason that it calls for this witness, who has admittedly never himself approved an application for insurance, to testify [34] as to what some doctor or other person would do under a given state of circumstances; and for other reasons to be assigned at the trial of this case.

A. I would say that no one was authorized to approve an application where either the plus Wassermann test was shown or aortitis; but with both

(Deposition of Richard B. Posey.)

together, why, no one could possibly approve that kind of an application, under the law, as the law was interpreted by the Veterans Administration.

Mr. Becker: That is all.

Recross Examination

By Mr. Miller:

Q. And that interpretation for the Veterans Administration was by regulation?

A. No. At that time it was the determination of those in charge of approving the applications. There has since been given in regulation form, written form, a definition of good health, but it has in no way changed what has been in the minds of all the people who have had to do with this insurance in approving applications, that if they were not in good health we couldn't approve them, and that bound the doctors and everybody else.

Q. Then, your answer to the last question propounded by Government counsel was based upon what you thought was in the minds of the people who approved the applications, wasn't it, Mr. Posey?

A. From my knowledge of the general practice of approving and disapproving applications, with which I have been very familiar for a long number of years.

Q. At the time this application was approved on April 2, [35] 1932, then, there was no regulation issued by the Veterans Administration defining good health?

(Deposition of Richard B. Posey.)

A. I am not positive, Mr. Miller, as to the exact date when that definition came out. That may have been out at that time; I am not positive.

Q. The regulation itself would show?

A. The regulation would show, and I forget the number of it here. I could give you my version of what the definition is.

Q. Could you attach to and make a part of this *definition* a copy of the official regulation defining good health, allowing counsel to examine the same before it is attached?

A. Yes, I could do that. I can get it for you, Mr. Miller.

Mr. Miller: That is all.

RICHARD B. POSEY

Signature of Witness

Subscribed and sworn to this 16 day of May, A. D., 1941.

[Seal]

LLOYD L. HARKINS

Notary Public in and for the District of Columbia.

My Commission expires September 1, 1942. [36]

[DEFINITION OF GOOD HEALTH.]

[3155. The words "good health" when used in connection with insurance, mean that the applicant is, from clinical or other evidence, free from disease, injury, abnormality, infirmity, or residual of disease or injury to a degree that would tend to weaken or impair the normal functions of the mind or body or to shorten life.] (May 17, 1934.)

United States of America,
District of Columbia:

I, Lloyd L. Harkins, a notary public duly commissioned and qualified in and for the District of Columbia of the United States, aforesaid, do hereby certify that pursuant to the annexed and attached notice, in compliance with Sections 639, 640, and 641 of Title 28 of the United States Code, there came before me on the 15th day of May, A. D., 1941, at 10 o'clock a. m., in Room 304 Columbian Building, 416 Fifth Street, Northwest, Washington, D. C., on behalf of the defendant, the following named person, to wit, Richard B. Posey, who was by me duly sworn to testify the whole truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause, and that he was thereupon carefully examined, upon his oath, and his examination reduced to writing under my supervision, and that the deposition is a true record of the testimony given by the witness; and that the said witness read the same and subscribed his name hereto.

I further certify that I am neither attorney or counsel for nor related to or employed by any of the parties to the action in which this deposition is taken, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

I further certify that, it being impracticable for me to deliver said deposition with my own hands into the court for which it was taken, I have re-

tained the same for the purpose of being sealed up and directed with my own hands and speedily and [37] safely transmitted to the said court for which it was taken, and to remain under my seal until there opened.

I further certify that the reasons for the taking of the deposition de bene esse of said witness are as stated in the notice of the taking thereof attached hereto, and made a part of this certificate; that the said notice given to the adverse party and the attendant papers and deposition are by me sealed up and directed to the Clerk of the District Court of the United States in and for the Southern District of California, Central Division, Los Angeles, California, and the same are by me enclosed in an envelope addressed and directed to the said court as aforesaid, duly and properly marked and identified, and said deposition forwarded herewith.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 16 day of May, A. D., 1941.

[Seal]

LLOYD L. HARKINS

Notary Public in and for the District of Columbia.

My Commission expires September 1, 1942.

[Endorsed]: Filed May 20, 1941. [38]

No. 10027

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

ROSETTA ALICE KELLEY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

APPELLANT'S BRIEF

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FILED

APR 21 1922

PAUL F. O'SHEEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10027

UNITED STATES OF AMERICA, APPELLANT

v.

ROSETTA ALICE KELLEY, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA. CENTRAL
DIVISION*

BRIEF FOR THE APPELLANT

JURISDICTION

This is an appeal by the Government (R. 24) from a judgment for the plaintiff (R. 16-18) in a suit to recover death benefits under a contract of United States Government life insurance (R. 2-6).

The jurisdiction of the District Court was conferred by 38 U. S. C. A. 445. It was established by the plaintiff's complaint and the Government's answer that the insured died August 10, 1935 (R. 4, 8); that a claim for death benefits under the insurance contract was filed thereafter by the plaintiff with the Veterans Administration and was denied by the Administrator of Veterans' Affairs (R. 8-9); that the suit was brought August 7, 1940 (R. 6). Accordingly, there existed a disagreement, as required by the statute, and the suit

was brought within the six-year limitation period provided by the statute.

The jurisdiction of this Court is conferred by the provision in 38 U. S. C. A. 445, *supra*, that Circuit Courts of Appeals should exercise appellate jurisdiction and by the provision in 28 U. S. C. A. 225, granting to such courts appellate jurisdiction to review final decisions of District Courts.

The appeal was taken within the limitation period of three months provided in 28 U. S. C. A. 230. The judgment of the District Court was entered June 2, 1941 (R. 18). A motion for judgment notwithstanding the verdict or in the alternative for a new trial was filed by the Government June 6, 1941 (R. 21-23) and was denied July 2, 1941 (R. 23). A notice of an appeal from the judgment was filed September 30, 1941 (R. 24), within three months after the denial of the motion.

STATEMENT OF THE CASE

It was established by the plaintiff's complaint, the Government's answer, and by stipulations, that in March 1932 Thomas Joseph Kelley made an application in writing to the Veterans' Administration under Section 310 of the World War Veterans' Act 1924, as amended, 38 U. S. C. A. 512 (a), for a \$5,000 United States Government life insurance policy, naming the plaintiff, Rosetta Alice Kelley, his wife, as the beneficiary; that the Veterans' Administration granted the application and issued the policy sued upon in the instant case; that monthly premiums were paid on the

policy, including the premium for the month of August 1935 during which Kelley, the insured, died (R. 3, 9, 30, 54-55).

The case was tried before District Judge J. F. T. O'Connor and a jury on the sole issue of whether, as alleged in the Government's answer (R. 9-13), the policy was obtained by fraudulent representations in Kelley's application for insurance. A motion for a directed verdict made by the Government at the close of the case was denied (R. 164).

SPECIFICATION OF ERRORS TO BE RELIED UPON

The Government relies upon the following points designated upon its appeal (R. 165-166):

1. That the trial court erred in denying defendant's motion for a directed verdict, and submitting the case to the jury for its determination, for the reason that defendant, by affirmative, substantial evidence, established as a matter of law, that the insurance policy sued upon had been obtained by fraudulent representations made by the insured in his application to the defendant for said insurance.

2. That the trial court erred in ordering judgment to be entered on the verdict.

3. That the trial court erred in making and entering its minute order of July 2, 1941, denying defendant's motion for judgment notwithstanding the verdict.

QUESTION PRESENTED

Whether, as a matter of law, the evidence requires a finding that the policy sued on was obtained by fraud.

STATUTES INVOLVED

Section 310, World War Veterans' Act, 1924, as contained in 38 U. S. C. A. 512a provides in part:

Notwithstanding the provisions of sections 511 and 512 of this title, the United States, upon application to the Veterans' Administration, shall grant United States Government life (converted) insurance against death or permanent total disability in any multiple of \$500 and not less than \$1,000 or more than \$10,000 to any person who had prior to May 29, 1928, applied or been eligible to apply for yearly renewable term insurance or United States Government life (converted) insurance: *Provided*, That such person is in good health and furnishes evidence satisfactory to the Administrator of Veterans' Affairs to this effect: * * *. (June 7, 1924, c. 320, §310; May 29, 1928, c. 875, § 15, 45 Stat. 970; July 3, 1930, c. 863, § 1, 2, 46 Stat. 1016.)

SUMMARY OF THE ARGUMENT

1. The evidence established beyond contradiction that representations made in Kelley's application on March 15, 1932, for the policy sued upon, that he had not applied for Government compensation and had not had any trouble except hemorrhoids since January 16, 1919, were false, made by him with knowledge of their falsity, and with the intent to deceive, and that the Government relied on each of them in issuing the policy. Since all of the elements of fraud were thus established by uncontradicted evidence, the District Court erred in denying the Government's motion for a directed verdict and its motion for judgment notwithstanding the verdict.

2. The District Court properly overruled the plaintiff's objections to evidence relied on by the Government herein.

ARGUMENT

I

The evidence required the conclusion as a matter of law that the policy sued on was obtained by fraudulent representations in the application therefor

SUMMARY OF THE EVIDENCE

Kelley, the insured, was a locomotive fireman by occupation, and a member of the Officers' Reserve Corps (R. 130). On March 15, 1932, he signed an application for insurance on a printed form issued by the Insurance Division of the Veterans' Bureau (Deft.'s Ex. A, R. 58-60). The following answers (among others) to questions propounded in the application appeared over his signature:

13. Have you ever applied for (a) Government compensation? *No.* * * * (d) Pension? *No.* (R. 58.)

* * * *

21. What operations have you had? * * * Hemroidectomy Sept. 1920 — *complete recovery.* Dr. Guy Cochran Los Angeles.

* * * *

25. Are you now in good health? *Yes.*

26. Have you ever been treated for any disease of * * * heart * * * *No.* * * * bones? *No.*

27. Have you * * * contracted any disease * * * or consulted a physician in re-

gard to your health, since date of discharge?¹
Yes. * * * Hemroidectomy Sept. 1920—no
 other trouble—see above (R. 59).

The following answers (among others) to questions propounded in a Medical Examiner's Report (which was a part of the application) appeared over the signature of a doctor for the railroad company which employed Kelley (R. 134):

40. Has applicant ever had syphilis * * *
 or rheumatism? *No.*

41. Any defects in the sight * * *? *No.*

42. Any deformity or departure from normal
 in any respect? *No.*

* * * * *

49. Do you recommend acceptance of the risk?
Yes. First-class risk. *Yes.* (R. 60). [*Italics supplied.*]

The application was sent to the office of the Veterans' Bureau in Washington where it was approved by the Insurance Medical Section (R. 60) and the policy was thereupon issued (R. 30).

On August 31, 1931, less than seven months prior to the application for insurance, Kelley had filed separate written applications with the Regional Office of the Veterans' Bureau at Los Angeles for compensation (Gov'ts. Ex. F., R. 82-88) and for disability allowance (Gov'ts. Ex. E, R. 75-81). In each application he described the nature of his ailments as rheumatism, heart trouble, and trouble with his spine (R. 77, 83, 84). In the application for compensation he stated that the

¹ Kelley was discharged January 16, 1919 (R. 58).

disability began in October or November 1918 while he was in the military service; that he was treated in "Base Hospital 48" (R. 83) and that the disability existed in December 1919 (R. 84). He listed as a civilian physician who had treated him since the beginning of his service in the World War (R. 83), Dr. F. P. King "D. C.", Chamber of Commerce Building, "Disability—Spinal adjustments." "Date — 9-30 — Mar. 31" (R. 84).

A report of examination made by Government physicians at Los Angeles October 28, 1931 (Govt's. Ex. G, R. 109) in connection with these claims (R. 115, 116) showed that Kelley complained of backaches and poor vision (R. 110), that a Wasserman blood examination was reported by the laboratory as positive (R. 113), and that Kelley's condition was diagnosed as "Aortitis, chronic, mild, with good cardiac tolerance" (R. 114). One of the doctors who signed the report described aortitis as an inflammation of the aorta, i. e., the large blood vessel leading out of the heart. He testified that this condition always called for a blood test for evidence of syphilis, and that the test in Kelley's case was reported positive (R. 121-122).

The only medical witness for the plaintiff testified that there was no indication in the report made by the Government physicians of any "visible effect" of syphilis on Kelley's body or health (R. 143). He further testified, however, that he was a medical examiner for five insurance companies (R. 136); that if he found that an applicant for insurance had aortitis and that the "Wassermann was positive" (R. 149) he would regard

the applicant as a "poor risk and subject to declination" (R. 150).

The Regional Adjudication Officer of the Veterans' Bureau at Los Angeles, in a letter dated November 17, 1931 (R. 128-129), advised Kelley, in effect, that he was suffering from 'aortitis, chronic, mild.'²

Subsequent to Kelley's death on August 10, 1935 (R. 31), the Director of Insurance of the Veterans' Administration in Washington, D. C., in a letter dated August 29, 1935 (Deft's. Ex. C, R. 71-72), advised an official of the American Legion that the policy had been canceled and the plaintiff's claim disallowed because of fraudulent misrepresentations made by Kelley in his application for the insurance upon which, it was stated, the Veterans' Administration had relied in issuing the policy.³

The plaintiff testified that from the time of her marriage to Kelley in 1922 (R. 130) until the beginning of his last illness in the early part of 1934, he was never sick at home (R. 132); that he attended to his duties as a locomotive fireman and was required every two years to submit to an examination by the company doctor. She further testified, however, that she did not know whether he consulted any physician (R. 132) or

² The letter further stated that both of his claims were disallowed; that he was not entitled to disability allowance because the Regional Rating Board had rated his disability as "less than permanent partial 25%," and that he was not entitled to compensation because the Board had decided that his disability was not incurred in or aggravated by his military service.

³ A copy of this letter was forwarded to the plaintiff herself (Deft's Ex. D., R. 74).

whether he received treatments for his back from Dr. King (R. 133).⁴

Three lay witnesses for the plaintiff testified that Kelley appeared to be in good health until the early part of 1934 (R. 155-156, 157-158, 162-163), and the testimony of the only other lay was, in effect, merely that "As a general thing" Kelley worked seven days a week for eight or nine hours per day as the fireman on an oil burning locomotive from 1929 until the early part of 1934 (R. 159, 161).

DISCUSSION

It is submitted that the evidence establishes beyond contradiction that Kelley made material misrepresentations of fact in his application signed by him on March 15, 1932 for the policy sued upon (R. 58-60); that these misrepresentations were fraudulent; that the Government relied on them in issuing the policy;⁵ and

⁴ Kelley stated in effect in his application for compensation that he had gone to "Dr. F. P. King, D. C." (apparently a doctor of chiropractic) for "Spinal adjustments" in 1930 and 1931 (R. 84).

⁵ The elements of the defense of fraud in such a case as the present one are disclosed in numerous decisions to be these: (1) A false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with the intent to deceive and be acted upon, (5) when action has been taken in reliance upon the representation. *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613, 620, 622; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 95; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 533; *Cooper v. Schlesinger*, 111 U. S. 148 (finding no error, p. 155, in the instructions of the District Court to the jury, pp. 152-153); *Lehigh Zine and Iron Co. v. Bamford*, 150 U. S. 665, 673; *United States v. Depew*, 100 F. (2d) 725 (C. C. A. 10); *Hindman v. First National Bank*, 112 Fed. 931, 944-945 (C. C. A. 6). Cf. *Southern Development Co. v. Silva*, 125 U. S. 247, 250; *Derry v. Peek*, 14 App. Cas. 337, 374 (House of Lords).

that, accordingly, the District Court should have directed a verdict in favor of the Government.⁶

It appears by the uncontradicted evidence, we submit, that the negative answer to question 13 as to whether Kelley had "ever applied" for "Government compensation" (R. 58) was false, that it was known by Kelley to be false at the time he made it, that he made it with the intention to deceive and be acted upon, that it concerned a matter which was material to the risk, and that the policy was issued in reliance upon its truth.

While the defense of fraud is, of course, established by uncontradicted evidence showing that the answer to this question alone was fraudulent, we further submit that the defense of fraud is also established by the representations in Kelley's answers to questions 21 and 27. He represented, in effect, by those answers, that since the date of his discharge from the military service, January 16, 1919, he had not had any "other trouble" than hemorrhoids from which, he stated, he

⁶ The rule is well settled that "When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *Slocum v. New York Life Insurance Co.* 228 U. S. 364, 369, quoted in *Gunning v. Cooley*, 281 U. S. 90, 93, with numerous supporting decisions. "A mere scintilla of evidence is not enough to require the submission of an issue to the jury." *Gunning v. Cooley*, p. 94; *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 339; cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229.

had completely recovered after an operation in September 1920 (R. 59.)

A. The representation that Kelley had never applied for Government compensation was fraudulent

Falsity.—The uncontradicted evidence establishes the falsity of this representation. It is not disputed that Kelley, on August 31, 1931, signed and swore to an application for compensation on a form issued by the Veterans' Bureau (Deft.'s Ex. F, R. 82-88). That the application was received by the Regional Office of the Bureau in Los Angeles, California, is established by the uncontradicted evidence that the application was denied in a letter dated November 17, 1931, from the Regional Adjudication Officer (Deft.'s Ex. H, R. 128-129).

Knowledge of falsity.—There can be no doubt that Kelley knew of the falsity of the representation. The fact that he was a member of the Officers' Reserve Corps shows that he was a person of more than average intelligence and education. He had received the letter denying his application for compensation and informing him that he was suffering from aortitis only about four months prior to signing the application for insurance containing the representation. Under the circumstances, we submit it is inconceivable that a person of his education and intelligence had so soon forgotten the fact that he had applied for compensation.

Materiality.—In the absence of any evidence to the contrary, Kelley's representation that he had not applied for compensation will, we submit, be presumed to be material simply by reason of the fact that the Vet-

crans' Administration made specific inquiry with respect to that subject. *Bella S. S. Co. v. Insurance Co. of North America*, 5 F. (2d) 570, 572 (C. C. A. 4); *Kerr v. Union Marine Insurance Co.*, 130 Fed. 415, 417 (C. C. A. 6); *Metropolitan Life Insurance Co. v. Madden*, 117 F. (2d) 446, 451 (C. C. A. 5).

It is also manifest that representation was material *per se*. Mere mention of the application for compensation would have opened the door to an examination by the insurance officials of the Veterans' Administration of the records relating to the application for compensation and this would have revealed not only the diagnosis of aortitis, but also the fact that a blood test for syphilis was positive. With such a condition Kelley was manifestly not in "good health", as required by Section 310 of the World War Veterans' Act, *supra*, upon which his application for insurance was based. Indeed, plaintiff's own medical witness, a medical examiner for five insurance companies, admitted that an applicant for insurance who was in that condition would be a "poor risk and subject to declination" (R. 149-150). It is thus apparent, we believe, that a truthful answer to the question relating to application for compensation would have made available to the insurance officials abundant information pertinent to a determination of whether the risk of issuing insurance against total permanent disability and death should be assumed.

Intention to deceive.—Kelley's intention to deceive is presumed as a matter of law from the fact that he made the representation with knowledge of its falsity. *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S.

613, 622; *Claflin v. Commonwealth Ins. Co.*, 110 U. S. 81, 95. See also *Stipcich v. Metropolitan Life Ins. Co.*, 277 U. S. 311, 316-317, pointing out that "even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him." Moreover, it is scarcely credible that a man of Kelley's education and intelligence could have been unaware of the fact that discovery by the insurance officials of the matters concerning his condition, contained in the records of his application for compensation, would at least impair his chances of obtaining insurance. The conclusion seems unavoidable that the misrepresentation in question was made in an effort to prevent the officials from obtaining that information.

Reliance.—The question as to whether an applicant had applied for Government compensation was manifestly inserted by the Insurance Division in the form of application for insurance for the purpose of obtaining an answer which could be relied on in issuing the insurance. *Stipcich v. Metropolitan Life Insurance Co.*, *supra*, and that being the function of the answer, it will be presumed, in the absence of evidence to the contrary, that the insurance officials relied upon Kelley's answer to that question in issuing the policy in the instant case. *United States v. Depew*, 100 F. 2d, 725, 728 (C. C. A. 10); *Columbian Nat. Life Ins. Co. v. Rodgers*, 93 F. 2d 740, 742. If they had known that Kelley had applied for compensation they would presumably have investigated the records concerning his

application therefor and thus would have discovered the diagnosis of aortitis and the fact that the blood test for syphilis was positive. There is no evidence that they did so and knowledge of the contents of those records may not be imputed to the Government. This Court held in *United States v. Riggins*, 65 F. 2d 750 that in issuing insurance through the Veterans' Bureau, knowledge of the contents of the records of another Department may not be imputed to the Government. That decision was followed by the Circuit Court of Appeals for the Tenth Circuit in *United States v. Depew*, *supra*, p. 728, and the principle announced by this Court was applied in *Jones v. United States*, 106 F. 2d 888, 890-891 (C. C. A. 5) and *Halverson v. United States*, 121 F. 2d 420 (C. C. A. 7), certiorari denied. 62 S. Ct. 412, to cases where the facts were substantially identical with those in the instant case.

B. The representation that Kelley had not had any trouble except hemorrhoids since January 16, 1919, was fraudulent

That this representation was fraudulent is, we submit, established beyond dispute by the sworn statement of Kelley himself in his application for compensation made less than seven months prior to the application for insurance, that he had heart and spine trouble and rheumatism in 1919 and that he was treated for spine trouble from September 1930 to March 1931 (R. 84); by the statement in the report of the medical examination made in connection with the application for compensation that Kelley complained of backaches and poor vision (R. 110); and by the fact that Kelley was advised by the letter of the Regional Adjudication Officer

only about four months prior to his application for insurance that he was suffering from aortitis (R. 128).

The testimony of the plaintiff and her lay witnesses had no tendency to refute the facts shown by this evidence that Kelley had been having trouble with his health for a long time prior to applying for insurance. It tended to show at most that the trouble had not become severe enough to be apparent or to disable him from work. Moreover, as we have previously shown, the condition concealed by Kelley was manifestly material to the risk.

II

No error was committed by the district court in overruling the plaintiff's objections to evidence relied on by the Government herein

The plaintiff objected (R. 116-117) to the admission of the report of medical examination by Government physicians, dated October 28, 1931 (Govt's. Ex. G, R. 109). The report was admitted in evidence subject to motion to strike (R. 118). No motion to strike the report was made. Hence the objection was waived.

The plaintiff also objected to the offer in evidence of a carbon copy of the letter dated November 17, 1931, from the Regional Adjudication Officer to Kelley (Deft.'s Ex. H. R. 128-129) for lack of proof that the original was mailed (R. 108). The Government withdrew the offer temporarily (R. 108) and called two witnesses to prove that the letter was mailed (R. 124-127). One testified in effect that she was an adjudication clerk at the Regional office on the date of the letter;

that part of her duties were to advise claimants as to the contents of awards of compensation (R. 124); that she had stamped the copy of the letter in question with her initials, thus indicating that she had dictated and read it (R. 124-125) and had filed the copy (R. 126); that "Apparently" she had also signed the letter for the Regional Adjudication Officer (R. 126); and that it was her custom, after signing such a letter, to deposit it in the section mail box from which such letters were taken to the mail section, where they were put in the mail (R. 125). The other witness testified, in effect, that he was employed at the time in question in the mail section and had personal knowledge of the practice of that section; that when a letter was signed and placed in a box for outgoing mail, it was picked up by the messenger and delivered to the mail section, where it was folded, put in an envelope, and mailed (R. 127). The Government then reoffered the copy of the letter and the plaintiff again objected, but solely on the ground that notice to produce had not been served on her, thus, in effect, waiving her previous objection. The objection was overruled and the copy admitted (R. 128). We submit that this ruling was correct.

The plaintiff conceded that the copy came from the records of the Veterans' Administration (R. 108). The correctness of the address thereon was not challenged and was manifestly correct. By shifting the ground of her objection the plaintiff, in effect, conceded that the mailing of the original was established. It will accordingly be presumed, in the absence of evidence to the contrary, that the plaintiff received the

original *Dunlop v. United States*, 165 U. S. 486, 495; *Columbian Nat. Life Ins. Co. v. Rodgers*, 93 F. 2d. 740, 742 (C. C. A. 10). The objection on the ground of lack of notice to produce is thus untenable. See *Edmunds v. Atchison, etc. Ry. Co.*, 174 Cal. 246, 247-248; *Pratt v. Phelps*, 23 Cal. App. 755, 757-758, and other cases collected in Ann. 51 A. L. R. 1498.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be reversed and the cause remanded with directions to enter judgment for the Government pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, in accordance with the motion for a directed verdict. *United States v. Marsh*, 107 F. 2d. 173, 174 (C. C. A. 4), rehearing denied, 108 F. 2d. 558.

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APRIL 1942.

No. 10027.

3

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

APPELLEE'S BRIEF.

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FILED

OCT 1 - 1942

PAUL P. O'BRIEN,
CLERK

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No. 10027.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

APPELLEE'S BRIEF.

Foreword.

The appellee earnestly contends that whether or not the appellant's affirmative defense of fraud was established by the required quantum of proof was wholly a question of fact which the jury resolved in favor of the beneficiary-plaintiff (appellee) and that as the appellant did not question the correctness of the charge as given to the jury by the learned trial judge, it is foreclosed now from maintaining that different rules of law are applicable; the instructions became "the law of the case." Therefore, while appellee has also endeavored to demonstrate in this brief that the "points" argued by appellant are not well taken, she does not thereby concede that any of them are now open to question, if included in the charge to the jury.

Emphasis and parenthetical words or remarks in this brief are supplied by the appellee, unless otherwise noted. All citations to the Federal Reporter are to decisions of a Circuit Court of Appeal, unless otherwise expressly noted.

I.

Summary of the Evidence.

Appellants' "Summary of the Evidence" quite properly follows the subhead "Argument," for it is neither accurate, fair, nor complete and entirely ignores the abecedarian rule that upon this appeal, this Court should view the evidence in the light most favorable to the appellee, including all inferences and presumptions deductible from the facts, so viewed, and all conflicts must be resolved in her favor. Appellant ignores *its* witness, Mr. Posey.

Appellant concedes that if it did not sustain the burden of proof on its affirmative defense, the judgment should be affirmed. Respondent's summary will be confined to that sole issue. It was admitted by the pleadings [R. 2 *et seq.*], or stipulated to at the trial [R. 29-31; 54-57] that all the facts alleged in plaintiff's complaint were true.

Thus, for example, there is and was no dispute that the defendant issued a \$5000 endowment insurance policy to Kelley, effective March 1, 1932, wherein his wife, the plaintiff, was the beneficiary; that he paid \$635.50 in premiums (none of which have been repaid, or tendered the beneficiary); that the policy was in force when he died, August 10, 1935; that a "disagreement" existed when the action was filed; and that plaintiff's cause of action was not barred by the lapse of time.

(1) The policy sued upon provided: "This policy shall be incontestable . . . except for fraud, non-payment

of premiums, or on the ground that the applicant was not a member of the military or naval forces of the U. S." [R. 43]. Rosetta Alice Kelley (plaintiff) was named the beneficiary [R. 33].

(2) The insured, Thomas J. Kelley, signed a written application for \$5000 U. S. Government insurance, dated March 15, 1932, in which it is stated that he had not previously applied for a Government compensation, or pension [R. 58, Question 13].

(3) He made an application for "disability allowance" to the Veterans' Administration, dated August 31, 1931 [R. 75] and for compensation [R. 82].

(4) In his application for insurance, it is denied that he had any operations except for hemorrhoids [R. 59, Ques. 21]. There was no evidence showing or tending to show the contrary.

(5) He answered the question: "Are you in good health?" in the affirmative [R. 59, Ques. 25]. He was employed as a railroad fireman by the Union Pacific Railroad from 1921. He worked eight to sixteen hours a day until 1932, when he worked eight to twelve hours. He was never home sick until his last illness [R. 130-132], which commenced February, 1934: he died August 10, 1935 [R. 134]. Joseph E. Scott, a title examiner, saw him very frequently between February, 1923 and February, 1934: Kelley never complained and appeared in good health during said entire term [R. 155-156]. John F. Hosfield, secretary of the Elks' Lodge at San Bernardino, in which city Kelley lived, saw him two to four times a month over a term of seventeen years, and at all times Kelley appeared to be in good health [R. 157-158]. Nelson Woods, a locomotive engineer, who knew Kelley since 1924, and worked with him on the same engine from

1929 to February, 1934, testified that they both worked seven days a week, eight to nine hours a day; and that Kelley was a good worker, doing the work of two men (of both fireman and conductor), the work being strenuous [R. 158-161]. Joseph Gross, a conductor on the Santa Fe Railroad (which shared the use of its tracks with the Union Pacific) saw Kelley very often between 1929 and 1933 and knew Kelley for over ten years and Kelley appeared at all times to have been in good health [R. 161-163]. His wife never knew him to have consulted a physician, except for required periodic examinations by the "company doctor" [R. 132-133].

(6) He was examined by Walter Lenker, M. D., on March 15, 1932 (as part of the insurance application), who found Kelley in good health [R. 60]. Dr. Lenker had known Kelley for nine years previously [R. 60]. Dr. Lenker died before the time of the trial [R. 134]. Dr. Lenker was employed as the "company doctor" for the Union Pacific Railroad [R. 134] and had examined Kelley at two-year intervals [R. 133]. If Kelley had suffered from syphilis, rheumatism, or any other disease in the nine years prior to the examination in 1932, Dr. Lenker knew nothing thereof and found no evidence thereof [R. 60].

(7) In his insurance application Kelley denied that he had been *treated* for any of several named diseases, including diseases of the heart, genito-urinary organs or bones [R. 59, Ques. 26]. In Kelley's application for compensation [Deft's Ex. "F," R. 82] he stated that Dr. F. P. King, D. C., a *chiropractor*, had given him "spinal adjustments" [R. 84].

(8) He was examined by Dr. Louis J. Burstein, an employee of the defendant, in connection with his appli-

cation for disability allowance and compensation and *not* for the purposes of treatment; the doctor did not give Kelley any advice, and testified, further, that Veterans' Administration regulations prohibited its doctors from doing so, and from telling Kelley what, if any, disease, the examination might disclose Kelley was suffering from [R. 115-118].

Dr. Burstein testified that he saw and examined Kelley just once, and discovered certain diseases. His findings were in direct, violent conflict with those of Dr. Lenker, who had known Kelley for nine years and had examined him at regular two-year intervals. (See par. "6," above.)

(9) Kelley, in his insurance application answered, in the negative [QUES. 27]: "Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since the date of discharge?" stating that he had an operation for hemorrhoids in 1920 [R. 59].

(10) After Kelley was examined by Dr. Burstein (upon his applications for compensation and pension) a letter was written to him [Ex. H, R. 128, 129] stating that his "disability, aortitis, chronic, *mild*" was "*less* than permanent partial 25%" and that it was not of "a degree of 10% or more." No other disease or disability is mentioned, nor is "aortitis" defined or given any common name readily comprehensive to a layman. There is no evidence that Kelley was ever informed of the existence of any disease or disability, except by this letter, if Kelley received it. There was no evidence that Kelley ever received it, nor that the letter was *not* returned to defendant, undelivered.

(11) Mr. Posey, produced by the defendant, in the stead of H. L. McCoy, its Director of Insurance, testified that when a claim of compensation or pension is filed, it is assigned a "C-number," and the Insurance Section (at the Central office) in Washington would receive information that such claim had been filed. Kelley's application for insurance produced by the defendant [Ex. A, R. 58, which is the same as Ex. No. 1, mentioned in Posey's deposition; see R. 196] had noted clearly on its face: "C 1783258; T-2015048; no K" [Your Honors' attention is called to the photographic reproduction of the exhibit, R. 58].

Posey further testified that the "C" number (showing the veteran *had* applied for compensation or pension) reach the Insurance Section; that there is a master index in Washington, showing the names of such veterans and their respective "C" numbers; that such information is supplied the Insurance Section "promptly" and that frequently that Section has copies of the reports of physical examinations made of such applicants and that it was "quite probable" that Kelley's report [Ex. G, R. 109-115] had been received by the Insurance Section and in its files before April 5, 1932, the date the insurance application was accepted by that Section [R. 214-221].

Posey also identified (C-1783258) as the claim number assigned to Kelley, before he applied for his insurance [R. 221; see, also, same "C" number on letter of November 17, 1931, Ex. H, R. 128].

Posey also stated that *before* an application for insurance could be accepted, it was necessary, under the law, to determine whether any "term" insurance had been previously in effect; that the Insurance Section looked up Kelley's record in its card index and determined he had

had such a "term" contract and noted its number on Kelley's application, viz: "T 2015048" [R. 225-226]. [Your Honors' attention is directed to the significant fact that the data giving the "T" number is written *below* Kelley's "C" number: Ex. A, R. 58].

Posey testified that the "T" number was ascertained and marked on the application of Kelley by the Insurance Section *before* the application was accepted [R. 226] and that "it shows right on here" [Ex. A, R. 58] that the Insurance Section *knew* Kelley had applied for compensation or pension *before* his application was accepted and *before* the insurance was issued [R. 226].

Posey further testified that if the facts found by Dr. Lenker were true [Ex. A, R. 60] that Kelley was in good health when he applied for the insurance [R. 227]. (Parenthetically, while Posey's complete deposition is set forth, R. 191-232, only parts are to be found in the original reporter's transcript, R. 90-107, for the reason that the court reporter only wrote down the parts objected to during the trial. Under the stipulation on file, R. 189-191, Your Honors may consider the entire Posey deposition except those portions withdrawn in open court during the trial or to which objections were sustained by the trial judge.)

Posey further testified [R. 226]:

"Q. Before granting the insurance? A. We checked the fact that he was entitled to it.

Q. And in checking that, it was the policy (of the Insurance Section) to look at the index card to determine whether he had previously had a term policy?

A. Yes.

Q. And this index card showed that he did previously have a term policy? A. He did.

Q. And what evidence is there on (his) application . . . of March, 1932 [Ex. A, R. 58] which indicates that? A. Well, on the first page of the application there is a notation 'T 2015048,' which is the term application number.

Q. And the index card which shows that T number also shows his C number, does it not? A. Yes.

Q. Then someone must have looked at that card and determined that he had a C number BEFORE his application was approved? A. . . . It is on the application. It shows right here (indicating).

Q. And that must have been put there before the application was approved, under those circumstances.

A. I'd think it was."

(12) Appellant concedes that "mere mention (by Kelley) of the application for compensation would have opened the door to an examination by the insurance officials of the Veterans' Administration of the records relating to the application for compensation, and this would have revealed not only the diagnosis of aortitis, but also the fact that a blood test for syphilis was positive" (p. 12, its Brief).

(13) Dr. Chapman testified that the report of the physical examination made by Dr. Burstein showed that if Kelley had syphilis at the time (Oct. 28, 1931), it had "no effect, visible effect" [R. 143]. And that if Kelley was affected with syphilis at that time, it was in "a very mild degree" [R. 147]. He likewise testified that *assuming* that all of the medical findings in the examination of the insured by the Government [Ex. G, R. 109-115] were true, nevertheless the conditions so shown would not have had any effect on Kelley's ability to pursue his usual vocation [R. 141].

(14) Appellant conceded, at the trial, that the report of the Government's examination of the insured [Ex. G, R. 109-115] showed "that there were no disabilities found by the medical examiner at that time" [R. 140, 141, 142].

From evidence, the concessions made by appellant during trial, the law as given to the jury (without objection or exception), the presumptions and inferences, and the weight given by it to the conflicts, the jury could have further determined:

(A) That Kelley's *claims* in his applications for compensation and disability pension (as to having certain disabilities) were untrue, and that his answers in his application relating to his death, were true.

(B) That it did not believe all the Government's medical evidence, or any part thereof, and did believe the lay and medical evidence produced by the appellee-beneficiary, in conflict therewith.

(C) That the Insurance Section of the Veterans' Administration made an investigation *before* approving Kelley's application or issuing the policy, and determined that his answers to Question 13 (a) and (d) [R. 58] were untrue, in fact, and that the Government's doctors had discovered both the alleged "aortitis" and syphilis, and waived the misrepresentations and the disabilities; that the Government did not therefore rely on the application; and that the Government relied on the findings of Dr. Lenker, the examining physician, which were true and correct.

(D) That Kelley never consulted a physician, since his discharge; that he never had been "ill" nor did he ever suffer from any "disease"; that if he had syphilis, he

didn't know it and had no reason to believe that he was suffering from any "illness" or "disease" when he made out his application.

(E) That Kelley's answers in his insurance application were true; or, if all were not literally true (in addition to the want or reliance and waiver, in Par. "C"), they were made in good faith, in the honest belief that they were true; that Kelley was not guilty of any fraud; and that his transactions as to the insurance were fair and regular.

(F) That the appellant had not presented the quantum of evidence required of it in sustaining each and every of the necessary elements of its affirmative defense (fraud).

(G) That Kelley had never been "treated" for any of the specific diseases enumerated in Ques. 26 (there was no evidence he had been), and that his answer to Ques. 25 was true [R. 59].

(H) That all of Ques. 26 [R. 59] should be reasonably interpreted to be read with and that Kelley honestly and justifiably read it in relation with the words, "been prevented by reason of ill health from attending your usual occupation," and that he was required, by Ques. 27, to report only if he had been "ill" or "contracted any disease," in the light of the words "been prevented . . . from attending your usual occupation," and that similarly, he had a right to interpret that complex question (Q. 27) in the light of the words "in regard to your health," and that he did so interpret said question, in good faith, and that his answers were not false or fraudulent. That the jury also determined that Q. 27 was ambiguous.

(I) That the physical examination made by the Government [R. 109-115] did not constitute either "consulting" a physician or being "treated" under either Ques. 26

or Ques. 27 [R. 59], and did not constitute treatment or consultation "in regrad to your (his) health."

(J) That a chiropractor was not understood by Kelley to be included in the term "physician," and that he had neither been "treated" by nor did he "consult" with "F. P. King, D. C."

(K) That in light of the medical and lay testimony in his favor, that Kelley did believe and he was justified in believing he was in good health, and not suffering from any "illness" or "disease."

(L) That from the letter from the Government, rejecting his claims for both compensation and disability pension [Ex. H, R. 128-129], he had a right to believe and did honestly believe that the only disability there reported, "aortitis, mild," viewed in connection with the references to "less than 25%" and "not of a degree of 10% or more," was inconsequential, or of little import, and was in fact either 0% or 1%, and hence was justified in not reporting the same, and was not guilty of fraud in not reporting it.

(M) That the presumption of innocence overcame the presumption that he received the letter [Ex. H, R. 128-129], and that he never did receive it.

Appellee submits that there were further findings of fact, and inferences and presumptions, which the jury (and the jury alone) had the right to make or draw from the evidence, and in view of the conflicts, the law of the case, and the law hereinafter set forth, together with the concessions of the appellant, made on this appeal, and its admissions made during the trial, that the general verdict of the jury, and the refusal of the trial judge to disturb it, should stand.

II.

The Law Contained in the Charge to the Jury Became the "Law of the Case."

Instructions, not excepted to by either party [R. 164, 188], became "the law of the case" and in determining whether the evidence was sufficient to sustain a verdict, its sufficiency should be tested by the law as announced in the instructions.

U. S. v. Atkinson (1936), 297 U. S. 157, 159, 56 S. Ct. 391, 392;

This was a Government insurance case wherein the trial judge erroneously instructed the jury on a question of law; the Government failed to question the correctness of the instructions, either by exception or request to charge, and its motion for a directed verdict was upon other grounds. [See R. 164, for grounds of motion for directed verdict, *re: U. S. v. Kelley*.]

In affirming judgment for plaintiff, the Supreme Court held that the verdict of a jury will not be set aside for error not brought to the attention of the trial court, saying:

"This practice is founded upon considerations of fairness to the Court and to the parties and of the public interest in bringing litigation to an end, after fair opportunity has been afforded to present all issues of law and fact."

Pacific States etc. Co. v. White (1935), 296 U. S. 176, 56 S. Ct. 159;

National Surety Corp. v. City of Excelsior Springs (1941), 123 F.2d 573, 577;

- MacDonald v. Schenkel* (1941), 125 F. 2d 737;
Standard Oil Co. v. Burleson (1941), 117 F. 2d 412, 414;
Aetna Life Ins. Co. v. McAdoo (1940), 115 F. 2d 369;
Kurn v. Stanfield (1940), 111 F. 2d 469;
Guardian Life Ins. Co. v. Kissner (1940), 111 F. 2d 532;
F. W. Woolworth Co. v. Carriker (1939), 107 F. 2d 689;
Grant Storage Battery Co. v. DeLay (1937), 87 F. 2d 726;
Travelers' Ins. Co. v. Schenkel (1929), 35 F. 2d 611;
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U. S. v. Hossman (1936), 84 F. 2d 808, 810;
N. Y. Life Ins. Co. v. Stone (1935), 80 F. 2d 614;
Taylor v. U. S. (1934), 71 F. 2d 76, 77;
U. S. v. Nickle (1934), 70 F. 2d 871;
Garrett Const. Co. v. Aldridge (1934), 73 F. 2d 814;
Paf Mft. Co. v. Polk (1934), 72 F. 2d 33;
Fricke v. Gen'l Acc. etc. Co. (1932), 59 F. 2d 563;
Aetna Cas. etc. Co. v. Reliable (1932), 58 F. 2d 100;
Skaggs Safeway Stores v. Dunkle (1931), 49 F. 2d 169, cert. den. 284 U. S. 622, 52 S. Ct. 9;

Fidelity & Cas. Co. v. Niemann (1931), 47 F. 2d 1056, 1060;

Hard & Rand v. Biston (1930), 41 F. 2d 625;

Yellowway v. Hawkins (1930), 38 F. 2d 731;

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d 176, *cert. den.* 281 U. S. 744, 50 S. Ct. 350;

Fuller v. Schuh-Mason Co. (1925), 6 F. 2d 531;

Gregg v. Sayre (1834), 33 U. S. 244.

This Court has stated that the instructions of the trial court determine the theory upon which the trial was had and that "this theory of the case, accepted by both parties at the trial, cannot be questioned for the first time on appeal."

Reidy v. Mynetti (1940, CCA-9), 116 Fed. 725, 729;

U. S. v. Aspinwall (CCA-9), 96 F. 2d 867;

Alverson v. Oregon-Wash. R. Co. (1916, CCA-9), 236 Fed. 331;

Boland v. Great No. Ry. Co. (1913, CCA-9), 202 Fed. 485.

It is to be assumed that the jury followed the Court's instructions.

Husky Ref. Co. v. Barnes (1941, CCA-9), 119 F. 2d 715, 717, 134 A. L. R. 1221.

It is appellee's further position that as all questions of fact were submitted to the jury under instructions as to which there was neither objection nor exception, "the verdict of the jury closes the question."

McDonald v. Schenkel (1941), 125 F. 2d 737;

U. S. v. Atkinson (1936), 297 U. S. 157, 56 S. Ct. 391;

Travelers' Ins. Co. v. Schenkel (1929), 35 F. 2d 611;

Julian Pet. Corp. v. Courtney (1927, CCA-9), 22 F. 2d 360.

Appellant "excepted" to *one* instruction as to attorney's fee, without stating the ground therefor [R. 188]; nor has appellant cited the same or any other alleged error of law in its specification of errors [R. 165-166] nor in its brief. The error, *if* any, was waived.

So. Pac. Co. v. Schwartz (1937, CCA-9), 89 F. 2d 192;

Rule 51, Rules of Civil Procedure;

O'Brien, "Manual Fed. App. Proc.," 3d Ed. (1941) p. 7, n. 1 (citing *9th Cir.*); pp. 126, 127; p. 127, n. 4; p. 211, n. 16, 17;

Rule 20, sub. "d", CCA, 9th Circuit; 136 A. L. R. p. 800, *note* (citing *9th Cir.*);

Liquid Veneer Corp. v. Smuckler (1937, CCA-9), 90 F. 2d 196 (Supreme Ct. Rule 8, strictly construed).

III.

The Motion for a Directed Verdict Was Properly Denied.

“The test as to whether a directed verdict should be granted, is not whether the evidence brings conviction in the mind of the trial judge; it is whether or not the evidence to support a directed verdict as requested, is so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.”

Berry v. U. S. (1941), 312 U. S. 450, 61 S. Ct. 637, 638 (citing and discussing Rule 50, “b”, RCP);

U. S. v. Bemis (1939, CCA-9), 107 F. 2d 894, 897;

Paul v. Elliot (1939, CCA-9), 107 F. 2d 872;

Wood Lbr. Co. v. Andersen (1936, CCA-9), 81 F. 2d 161, 166, cert. den. 297 U. S. 723, 56 S. Ct. 669;

LaMarche v. U. S. (1928, CCA-9), 28 F. 2d 828: (Held: contradictory statements made by insured created a conflict for jury; judgment on directed verdict, reversed);

O'Brien, “*Manual of Fed. App. Proc.*,” 3d Ed. (1941), p. 15, notes 17 and 20, and cases cited, therein, which are not repeated, above.

“It is not without significance on the appeal that the judge, who heard the testimony and was in a position to observe the demeanor of the witnesses, not only declined to direct a verdict [R. 164], but denied as well a motion for a new trial” [R. 23].

Phoenix etc. Express v. Mendez (1939, CCA-9),
103 F. 2d 66, 69, *cert. den.* 308 U. S. 566, 60
S. Ct. 79;

Berry v. U. S. (1941), 312 U. S. 450, 61 S. Ct.
637;

Chrisite v. Callahan, 124 F. 2d 825, 827;

U. S. v. Barnette (1937), 91 F. 2d 10, 11.

IV.

It Is the Function of the Jury and Not the Circuit Court of Appeals, to Weigh the Evidence.

A few of its many decisions in point, selected at random, are:

U. S. v. Holland (1940, CCA-9), 111 F. 2d 949:
(*Held*: immaterial that this Court might be of the opinion that the evidence preponderated in favor of appellant);

Liquid Veneer Corp. v. Smuckler (1937, CCA-9),
90 F. 2d 196, 205: (“Verdict should not be set aside if it can be sustained from *any* viewpoint);

U. S. v. Todd (1934, CCA-9), 70 F. 2d 540;

Phoenix Ins. Co. v. Bakovic (1924, CCA-9), 2 F.
2d 857.

V.

Only Evidence Favorable to Appellee Should Be Considered.

In determining whether the general verdict of the jury is supported by substantial evidence, all conflicts must be resolved in favor of the appellee, and the evidence should be viewed in the light most favorable to her, including all inferences and presumptions deducible from the facts so viewed.

- Lumbra v. U. S.*, 54 S. Ct. 272, 290 U. S. 551;
Story Parchment Co. v. Patterson (1931), 282 U. S. 555, 51 S. Ct. 248;
Gunning v. Cooley (1930), 281 U. S. 90, 50 S. Ct. 231; (cited by appellant, p. 10, its Brief);
Copp v. Van Hise (1941, CCA-9), 119 F.2d 691, 695;
U. S. v. Smith (1941, CCA-9), 117 F.2d 911;
U. S. v. Holland (1940, CCA-9), 111 F.2d 949;
Maryland Casualty Co. v. Stark (1940, CCA-9), 109 F.2d 212;
U. S. v. Aspinwall (CCA-9), 96 F.2d 867;
U. S. v. Meakins (CCA-9), 96 F.2d 751, 756;
U. S. v. Hartley (CCA-9), 99 F.2d 923;
U. S. v. Pritchard, 95 F.2d 619 (inconsistent statements go to weigh and credibility for jury's consideration);
U. S. v. Klever (CCA-9), 93 F.2d 15;
Bailey v. U. S., 92 F.2d 456: ("It was for the jury . . . to say which statements were true and which were false, which were innocently and which were fraudulently made.");

U. S. v. Bodge, 85 F.2d 433 (conflicts between statements by insured in application for insurance and his testimony at trial);

U. S. v. Todd (CCA-9), 70 F.2d 540;

U. S. v. Alger (CCA-9), 68 F.2d 592;

Fidelity & Cas. Co. v. Griner (1930, CCA-9), 44 F.2d 706, 707;

Ford Motor Co. v. Pearson (1930, CCA-9), 40 F.2d 858;

U. S. v. Robbins (1941), 117 F.2d 145: (defense fraud);

Jones v. U. S. (1940), 112 F.2d 282: (fraud defense);

Drew v. U. S., 104 F.2d 939.

After verdict, all evidence and inferences properly deducible therefrom, tending to support the verdict, must be indulged by the Appellate Court.

U. S. v. Holland (1940, CCA-9), 111 F.2d 949 (*Held*: what Your Honors' verdict would have been as jurymen is not to be considered);

U. S. v. Dudley (CCA-9), 64 F.2d 743;

O'Brien, "Manual of Fed. App. Proc.," 3d Ed. (1941), p. 15, note 18 (citing 9th Cir.).

It is "Hornbook law" that the "burden of proof" doesn't shift, on an appeal, and that it was not necessary for appellee, before the trial court, to *disprove* appellant's affirmative defense, of fraud. Appellant *stipulated* that plaintiff-appellee had made out a *prima facie* case, and that judgment should go to her UNLESS it sustained it's burden of proof.

And *even if* the “substantial evidence” test is to be applied to appellee’s evidence (including presumptions and inferences in her favor), in relation to appellant’s affirmative defense of fraud, then it is settled law that the phrase “substantial evidence” means more than a “scintilla” and *less* than “the weight of the evidence”, and refers to the ultimate facts, as contra-distinguished from so-called primary facts. “Primary facts” are matters which can be readily established by direct testimony; whereas the “ultimate facts” are those which must be arrived at by a process of inferences from the primary facts, and applicable presumptions. Appellant, in its brief, *incorrectly* takes the position that the burden was on the appellee to *disprove* its affirmative defense, and not on it to sustain it by “clear, cogent, convincing and satisfactory proof” [R. 181].

N. L. R. B. v. Hudson Motor Car Co. (June, 1942), 128 F. 2d 528, 532;

Fidelity & Cas. Co. v. Martin (1933, CCA-9), 66 F. 2d 438.

In other portions of this Brief, appellee discusses and gives citations to the various circumstances wherein a *jury* question is presented—where the determination is one of *fact*, even where the evidence is uncontradicted—and the effect of inferences and presumptions, in support of the verdict.

VI.

An Inference Is a Permissible Deduction Which the Jury Is Entitled to Draw From the Evidence.

It has no legal probative effect *other than* the *jury* is pleased to attribute to it in a given case [R. 179-180].

Puget Sound Elec. Co. v. Benson (1918, CCA-9),
253 Fed. 710, 714.

The function of drawing inferences from the evidence is reserved wholly to the *jury*.

LaGuerre v. Brasileiro (1942), 124 F. 2d 553;
Halliday v. U. S. (1942), U. S., 62 S.
Ct. 438.

The function of *weighing* conflicts between inferences and other evidence, is that of the *jury* [R. 181].

Hayden v. U. S. (1930, CCA-9), 41 F. 2d 614;
Berry v. U. S. (1941), 312 U. S. 450, 615 S. Ct.
637;
Puget Sound Elec. Co. v. Benson (1918, CCA-9),
253 Fed. 710, 714;
Copp v. Van Hise (1941, CCA-9), 119 F. 2d 691,
695.

Even where evidence is undisputed, if different inferences may reasonably be drawn from it, it is for the jury to say what inferences shall be drawn, and they may be guided to their conclusion by the rule as to the burden of proof, which appellant concedes was on it.

Ft. Dodge Hotel Co. v. Bartelt (1941), 119 F. 2d
253, 259;
Puget Sound Elec. Co. v. Benson (1918, CCA-9),
253 Fed. 710, 714.

Where facts give equal support to each of two inconsistent inferences, judgment must go against the party on whom rests the burden of sustaining one of such inferences against the other [R. 181].

Ft. Smith Gas Co. v. Cloud (1935), 75 F. 2d 413;
Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311; cited by appellant, p. 13, its Brief).

VII.

In Determining the Sufficiency of the Evidence, to Support the Verdict, That of the Appellee May Be Aided by Presumptions.

Collins v. Streitz (1938, CCA-9), 95 F. 2d 430, cert. den. 305 U. S. 608;

Conn. etc. Ins. Co. v. Maher (1934, CCA-9), 70 F. 2d 441, cert. den. 293 U. S. 591, 55 S. Ct. 106;

Puget Sound P. & L. Co. v. Seattle (1928, CCA-9), 29 F. 2d 254.

In the absence of sufficient satisfactory proof to *overcome* it, the jury should find according to a rebuttable presumption [R. 175, 179, 181, 182].

Bernstein v. Laughran (1938, CCA-9), 96 F. 2d 616, cert. den. 305 U. S. 629;

Puget Sound P. & L. Co. v. Seattle (1928, CCA-9), 29 F. 2d 254: (This court held that the presumption of fair dealing outweighs any conjecture leading to an opposite conclusion);

Easton v. Brant (1927, CCA-9), 19 F. 2d 857, 859: (It is a "well-settled principle of law" that if there is a failure to overcome a presumption

by testimony "convincing beyond reasonable controversy," the presumption will prevail);

Puget Sound Elec. Co. v. Benson (1918, CCA-9), 253 Fed. 710, 714.

The processes of probable reasoning in drawing a presumption and in weighing the evidence to overthrow it, are matters for the jury [R. 181, 182].

Conn. etc. Ins. Co. v. Maher (1934, CCA-9), 70 F. 2d 441, cert. den. 293 U. S. 591, 55 S. Ct. 106;

Metropolitan Life Ins. Co. v. Broyer (1927, CCA-9), 20 F. 2d 818;

Meoteris v. U. S. (1939), 108 F. 2d 402, 404;

Gilmore v. U. S. (1938), 93 F. 2d 774, 776, cert. den. 304 U. S. 567;

Penn. Mut. L. Ins. Co. v. Tilton (1936), 84 F. 2d 10.

VIII.

This Court Has Recognized Statutory Presumptions.

N. Y. Life Ins. Co. v. Gamer (1939, CCA-9), 106 F. 2d 375;

Bernstein v. Laughran (1938, CCA-9), 96 F. 2d 616, cert. den. 305 U. S. 629 (where this court applied the California disputable presumptions);

Sacramento Suburban etc. Co. v. Nelson (1930, CCA-9), 36 F. 2d 929;

Northwestern v. Higgins (1926, CCA-9), 15 F. 2d 646, cert. den. 273 U. S. 746, 47 S. Ct. 448;

Jenkins v. Anaheim (CCA-9), 247 Fed. 958, 961.

The District Judge charged the jury, without objection:

1. A presumption is evidence . . . and disappears only if the defendant produces sufficient evidence to preponderate against it [R. 182].

2. It is presumed that insured was innocent of crime or wrongdoing; that his transactions were fair and regular; that the answers made in his application were true and correct [R. 181, 192].

3. If evidence containing inconsistencies and incongruities is reconcilable, the presumption of innocence and fair dealing will impute the variance to misconception or mistake, rather than to a wilful and corrupt misrepresentation [R. 181].

4. Fraud is never presumed and the burden was of appellant to overcome the presumptions of innocence, truth and fair-dealing by clear, cogent, convincing and satisfactory proof [R. 181].

As elsewhere pointed out, these propositions of law became "the law of the case." (II, this Brief.)

All evidence which is admissible under the rules of evidence in the courts of general jurisdiction of California, was admissible in this action.

Rule 43(a), Federal Rules of Civ. Proc.

The rule is firmly established in *this* state that a presumption is *evidence*. It may outweigh other evidence adduced against it, and even as against an admitted or

proved fact, it remains with the jury to say whether or not that fact has been proven; and if the jury is not satisfied with the proof offered, it is at liberty to accept the proof of the presumption [R. 181, 182].

In this state, a presumption is not dispelled by evidence produced by the opposite party, but *remains as evidence* of a character sufficient to support a judgment.

Speck v. Saver (1942), 16 Adv. Cal. 615, 128 P. 2d 16, rehearing denied by Calif. Supreme Court Aug. 20, 1942;

Westberg v. Willde (1939), 14 Cal. 2d 360, 94 P. 2d 590;

England v. Auburn Auto Sales Corp., 11 Cal. 2d 64, 70, 77 P. 2d 1059, 1063;

Smellie v. So. Pac. Co., 212 Cal. 540, 299 Pac. 529, 532;

Woodward v. So. Pac. Co. (1939), 35 Cal. App. 2d 130, 94 P. 2d 1028, *cert. den.* 309 U. S. 670, 60 S. Ct. 614;

Sec. 1959, Calif. Code Civ. Proc.: "A presumption is a deduction which the law expressly directs to be made from particular facts."

Sec. 1961, Ibid.: "A presumption (unless declared by law to be conclusive) may be controverted by *other evidence* . . ."

Sec. 1963, Ibid.: (listing as *some* of the disputable presumptions):

1. That a person is innocent of crime or wrong;
19. That private transactions have been fair and regular;
33. That the law has been obeyed.

IX.

The Appellant Had the Burden of Proof and Did Not Sustain It Where the Evidence Leaves the Ultimate Fact to Be Proved, Conjectural, or Where the Proven Facts Give Equal Support to Each of Two Inconsistent Inferences [R. 178, 181].

Penna. R. R. v. Chamberlain, 288 U. S. 364 (cited by appellant, p. 10, its Brief);

Stevens v. White City (1932), 285 U. S. 195, 52 S. Ct. 347;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231 (cited by appellant with approval, p. 10, its Brief);

U. S. v. Holland (1940, CCA-9), 111 F. 2d 949: (“If the evidence leads as reasonably to one hypothesis as to another, it tends to establish neither”);

Adair v. Reorganization Inv. Co. (1942), 125 F. 2d 901, 905;

Thomson v. Stevens (1939), 106 F. 2d 739, 742.

This Court has held that the presumption of fair dealing outweighs any conjecture leading to an opposite conclusion [R. 181].

Puget Sound P. & L. Co. v. Seattle (1928, CCA-9), 29 F. 2d 254;

Sac. Suburban etc. Co. v. Nelson (1930, CCA-9), 36 F. 2d 929.

X.

Whether or Not Kelley Was Guilty of Fraud Was a
Question of Fact for the Jury.

Gregg v. Sayre (1834), 33 U. S. 244;

Smith v. Vodges (1875), 92 U. S. 183;

St. Paul Ins. Co. v. Balfour (1909, CCA-9), 168
Fed. 212;

American Ins. Co. v. Vann (1941), 118 F. 2d 1004;

U. S. v. Robins (1941), 117 F. 2d 145;

Bailey v. U. S. (1937), 92 F. 2d 456;

Fidelity & Cas. Co. v. Genova (1937), 90 F. 2d
874: ("The issue of fraud was fairly submitted to the jury and its finding thereon is conclusive");

Metropolitan Life Ins. Co. v. Stringer (1928),
28 F. 2d 665.

XI.

Fraud, When Urged as an Affirmative Defense, Must
Be Established by Clear, Cogent, Convincing and
Satisfactory Proof [R. 181]. Such Burden of
Proof Was on Appellant [R.174-175].

Ocean Acc. etc. Co. v. Rubin (1934, CCA-9), 73
F. 2d 157;

Northwestern Life v. Wiggins (1926, CCA-9), 15
F. 2d 646, cert. den. 273 U. S. 746, 47 S. Ct. 448:
("clear, cogent, convincing, and certain proof");

So. Development Co. v. Silva (1888), 125 U. S.
247, 250: ("clear and decisive proof": cited with
approval by appellant, p. 9 of its Brief);

Smith v. Vodges (1875), 92 U. S. 183;

- American Ins. Co. v. Vann* (1941), 118 F. 2d 1004;
Kuhn v. Chesapeake (1941), 118 F. 2d 400, 405;
Jones v. U. S. (1940), 112 F. 2d 282, 287;
Marshall v. Gelfano (1938), 99 F. 2d 85 (“un-
equivocal and convincing”);
New York Life Ins. Co. v. Bacalis (1938), 94 F.
2d 200: (citing *Northwestern v. Wiggins*, 9th
Cir., 15 F. 2d 646);
Fidelity & Casualty Co. v. Genova (1937), 90 F. 2d
874;
Griffiths v. Commissioner (1931), 50 F. 2d 782,
786: (“clear and convincing evidence”);
Wharton v. Aetna (1931), 48 F. 2d 37, *cert. den.*
284 U. S. 621, 52 S. Ct. 9;
Jemison v. Commissioner (1930), 45 F. 2d 4, 5, 6;

XII.

Fraud Is Never Presumed [R. 181, 182].

- Gregg v. Sayre* (1834), 33 U. S. 244;
Wharton v. Aetna (1931), 48 F. 2d 37, *cert. den.*
284 U. S. 621, 52 S. Ct. 9;
Bernstein v. Langharn (1938, CCA-9), 96 F. 2d
616, *cert. den.* 305 U. S. 629, 59 S. Ct. 93;
Zell v. Bankers' Utilities Co. (1935, CCA-9), 77
F. 2d 22, 27;
May Hosiery Mills v. U. S. Dist. Ct. (1933,
CCA-9), 64 F. 2d 450;
Sac. Suburban Fruit Lands Co. v. Nelson (1930,
CCA-9), 36 F. 2d 929;
Gung You v. Nagle (1929, CCA-9), 34 F. 2d 848;
Sec. 1963, subs. 1, 19, 33, Calif. Code Civ. Proc.

XIII.

The Statements in the Application Were Representations and Not Warranties [R. 183].

Northwestern Mutual Life Ins. Co. v. Wiggins (1926, CCA-9), 15 F. 2d 646, cert. den. 273 U. S. 746, 47 S. Ct. 448;

U. S. v. Depew, 100 F. 2d 725;

Sentinel Life Ins. Co. v. Blackmer (1935), 77 F. 2d 347;

Chicago etc. Ry. v. Dixie (1930), 39 F. 2d 537;

Bankers' Reserve Life Ins. Co. v. Matthews (1930), 39 F. 2d 528.

XIV.

Terminology of Application to Be Construed in Favor of the Insured.

Where, as here, the application form [R. 58-60] is prepared by the insurer, the meaning of words or phrases must be liberally construed and interpreted in favor of the insured and strictly construed against the insurer; and this rule applies to the answers given by the insured.

Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311 (cited by appellant, p. 13, its Brief);

Bankers' Life Ins. Co. v. Hollister (1929, CCA-9), 33 F. 2d 72;

Mutual Reserve L. Ins. Co. v. Dobler (CCA-9), 137 Fed. 550;

American etc. Co. v. Apt. (1934), 74 F. 2d 345, 348;

Wharton v. Aetna (1931), 48 F. 2d 37, cert. den. 284 U. S. 621, 52 S. Ct. 9;

The incontestability clause should be liberally construed in favor of the insured veteran and his beneficiary.

U. S. v. Patryas (1938), 303 U. S. 341, 58 S. Ct. 551;

Aschenbrenner v. U. S. F. & G. Co. (1934, certiorari to *CCCA-9*), 292 U. S. 80;

Mutual Life Ins. Co. v. Hurni (1923), 263 U. S. 167, 44 S. Ct. 90, 31 A. L. R. 102.

The terms “good health,” “ill,” and “disease,” in an application for insurance, must not be considered in the light of scientific, technical definitions, but in the light of the insured’s understanding of the terms.

Mutual Life Ins. Co. v. Frey (1934, *CCA-9*), 71 F. 2d 259.

See I, this Brief (“Summary of the Evidence”), subs. “H”, “D”, “G”, “I”, “J”.

XV.

A Misrepresentation, Made Without Knowledge of Its Falsity, Is Not “Fraud.”

A representation is not fraudulent unless made with *knowledge* of its falsity [R. 182, 184].

Appellant’s Brief, p. 9, note 2.

Whether or not any statement made by Kelley *was* false or whether, the jury having found it to be untrue, Kelley *knew* that his answer in his *insurance* application was false, was solely for the determination by the *jury*,

as a question of fact. The burden of proof was on the defendant.

Moulor v. Amer. Life Ins. Co., 111 U. S. 335,
4 S. Ct. 466, 469;

Northwestern Mut. Life Ins. Co. v. Cohn (1939,
CCA-9), 102 F. 2d 74 at 77;

Prudential Ins. Co. v. Winn (CCA-9), 71 F. 2d
126;

Northern Life Ins. Co. v. King (CCA-9), 53 F. 2d
613, cert. den. 385 U. S. 944, 52 S. Ct. 394;

Northwestern Mut. L. Ins. Co. v. Wiggins (1926,
CCA-9), 15 F. 2d 646, cert. den. 273 U. S. 746,
47 S. Ct. 448;

U. S. v. Robins (1942), 117 F. 2d 145 (syphilis);
Jones v. U. S. (1940), 112 F. 2d 282;

Pilot Life Ins. Co. v. Dickinson (1938), 93 F. 2d
765, 766, 767;

Bailey v. U. S. (1937), 92 F. 2d 456;

Jeffress v. N. Y. Life Ins. Co. (1935), 74 F. 2d
874;

Wharton v. Actna (1931), 48 F. 2d 37, cert. den.
284 U. S. 621, 52 S. Ct. 9;

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d
176, cert. den. 281 U. S. 744, 50 S. Ct. 350;

Mays v. New Amsterdam Cas. Co. (1913), 40
App. D. C. 249, cert. den. 238 U. S. 624, 35
S. Ct. 662;

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d
665.

The law raises no presumption of knowledge of falsity from the fact, *per se*, that the representation was false.

Southern Dev. Co. v. Silva (1888), 125 U. S. 247, at 258 (cited with approval by *appellant* on p. 9, its Brief);

Sentinel Life Ins. Co. v. Blackmer (1935), 77 F. 2d 347.

Kelley's statement that he had "heart trouble" [R. 77] was the expression of a layman's opinion, and entitled to no more weight or value, because written, than if he had given the same non-expert conclusion in person, at the trial. Though admissible (because he was dead), that and other statements of Kelley were not *conclusive*.

Nelson v. Perryman, 48 F. 2d 99, 101;

Bushey v. Hedger, 40 F. 2d 417, 418;

Royster v. Dist. Judge (1942), 128 F. 2d 197.

XVI.

Even IF Kelley's Answer to Q. 13 "a" Was Knowingly Made and Wilfully False, Such Misrepresentation Was Waived.

The expert produced by appellant as a witness on its behalf (Mr. Posey) testified that the Insurance Section of the Veterans' Administration placed the number "C 1783 255" on the face of the application [R. 58] before the application was accepted, and the jury had the right to conclude from all his testimony that it *knew* that Kelley had applied for compensation, previously, and hence it did not rely on Kelley's answer to Question 13 (a) [R. 58].

It is significant to note the admission in appellant's brief:

"Mere mention of the application for compensation would have opened the door to an examination by the insurance officials of the Veterans' Administration of the records relating to the application for compensation and this would have revealed not only the diagnosis of aortitis, but also the fact that a blood test for syphilis was positive" (p. 12).

Statements in a brief may be considered as admissions of fact.

O'Brien, *"Manual Fed. App. Proc."*, 3d Ed. (1941), p. 210, n. 10.

Appellant's own witness (Mr. Posey), produced and vouched for by it, testified that from the above-referred-to "C" number on the application, was "very likely" placed on the application before it was accepted [R. 218]; that the Insurance Section had an index of all applications for compensation, alphabetically arranged and that he was positive Kelley's "C" number was that index [R. 216]; that a "C" number is assigned to each applicant for compensation, and it was "quite probable" that a copy of the physical examination of Oct., 1931 [Ex. G, R. 109-115] was on file when it discovered Kelley's "C" number—*before* the application was approved or the policy issued. He admitted that the Insurance Section checked to see whether Kelley had had war risk term insurance *before* the application was approved, and that the presence of the "T" number on the application

["T-2015048," R. 58] just under and obviously written after the "C" number was looked up and written on the application, affirmed such fact, and that the *same* index card which shows the "T" number *also* shows the "C" number.

Testimony that the insurer would not have written the policy had it known the true facts is not conclusive as to the materiality of the misrepresentations, as a matter of law, but is only evidence to be considered by the *jury*.

Pac. Mutual Life Ins. Co. v. Johnson (1934), 74 F. 2d 367.

The *Insurance* Section of the Veterans' Administration, made an investigation of its *own* records (and *not* of some other department) and *before* accepting Kelley's application, determined that he *had* applied for compensation or pension [R. 191, 214-222].

As a result, they knew:

- 1: That two answers by Kelley in his application were not correct: Ques. 13 (a) or 13 (d) [R. 58].
- 2: That Kelley had received a medical examination by the Veterans' Administration, a copy of the diagnosis being in the *Insurance Section*;
- 3: *If* such an examination was "consulting" a physician then it knew Kelley's answer to Q. 27 [R. 59] was incorrect.

As the Insurance Section of the appellant actually undertook to make investigations of its own, and nothing

being done by Kelley to prevent that investigation from being as full as it chose to make it, appellant cannot afterward allege that misrepresentations were made, particularly where it accepts the premiums for 6½ years [R. 54, 55] and does not hurl the charge of “fraud” until after the one person best able to meet and refute the ugly, sinister accusation has had his lips sealed forever by his death.

Southern Dev. Co. v. Silva (1888), 125 U. S. 247
(cited with approval by *appellant* on p. 9, its Brief).

“Knowledge which is sufficient to lead a prudent person to inquire about the matter (such as knowledge of facts inconsistent with statements in an application), when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed and will be regarded as knowledge of the facts.”

Columbian etc. Ins. Co. v. Rodgers (1940), 116
F. 2d 705; *cert. den.* 313 U. S. 561, 61 S. Ct.
838;

Mutual Life Ins. Co. v. Selby (1896, CCA-9),
72 Fed. 980: (Where insurer knew insured had applied for a Civil War veterans’ disability pension; “notice was thereby given to the insurance company that it might, on examining the pension roll, discover further particulars concerning its contents.”);

Bowles v. Mutual Benefit Assn. (1938), 99 F. 2d
44;

Penn-Nat'l etc. Co. v. Gen'l Fin. Corp. (1926), 16 F. 2d 36: (Where a person receives information which would indicate to any prudent person that a fraud had been committed or which is of a suspicious character, the jury has the right to infer from the circumstances, that such person actually made investigation and discovered the fraud.);

Farrar v. Policy Holders' Life Ins. Co., 3 Cal. App. 2d 87, 39 P. 2d 229; hearing denied, Calif. Supreme Ct., 1935: (The insured knew the applicant was receiving a pension for physical disability as a Spanish-American War veteran. *Held*: That it must be presumed that when the insurer, with this knowledge, issued the policy and accepted and retained the premiums, it waived the insured's misrepresentation as to his condition of health.)

It is submitted that appellant did not sustain the burden of proof as to Question 13; that under the evidence, it was not deceived, nor did it rely on the insured's answer. It made its own investigation. Knowing the facts, it issued the policy, collected and retained (and still retains—[R. 56-57]) the premiums. Its assertion of "fraud" is wholly without merit. For a more detailed statement of Mr. Posey's testimony, see I, (11); also see I, (12) and (C), Appellee's "Summary of the Evidence," this brief.

XVII.

Evidence Which Is Uncontradicted Is Not Necessarily to Be Accepted as True, nor Binding on the Jury.

Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 233: (cited with approval in *Wood Lbr. Co. v. Andersen* (1936, CCA-9), 81 F. 2d 161, *cert. den.* 297 U. S. 723, 56 S. Ct. 669, and by appellant, p. 10, its Brief);

Davis v. Coblens, 174 U. S. 719, 727, 19 S. Ct. 832, 835;

So. Pac. Co. v. Hanlon (1925, CCA-9), 9 F. 2d 294, 296: ("It is often a difficult question to decide when a witness is in a legal sense, uncontradicted.");

Travelers' Ins. Co. v. Price (1940), 111 F. 2d 776, 777; *cert. den.* 311 U. S. 676, 61 S. Ct. 43: ("The well-settled rule in the courts of the United States is that although the facts may be undisputed, if reasonable men might draw different conclusions from them, the case is for the jury.");

Elsig v. Gudwangen (1937), 91 F. 2d 434, 440;

Best v. Dist. of Columbia (1934), 291 U. S. 411, 54 S. Ct. 487, 489.

XVIII.

Weight of Expert Testimony for Jury.

The jury may exercise an independent judgment in determining how far it will follow the opinions expressed, the credibility of the expert witness and the weight to be given his testimony; and in the event of conflicting opinions, to resolve such conflicts [R. 180-181].

Pence v. U. S. (1942), U. S., 62 S. Ct. 1080 (*Held*: credibility of doctor's testimony clearly for the jury);

Maryland Cas. Co. v. Stark (1940, CCA-9), 109 F. 2d 212;

U. S. v. Bemis (1939, CCA-9), 107 F. 2d 894: (the medical findings of the Government are not conclusive);

U. S. v. Hill (1938, CCA-9), 99 F. 2d 755;

U. S. v. Bodge (1936) 85 F. 2d 433;

U. S. v. Burleyson (1933, CCA-9), 64 F. 2d 868;

U. S. v. Francis (1933, CCA-9), 64 F. 2d 865, 867;

U. S. v. Alger (CCA-9), 68 F. 2d 592, 593;

U. S. v. Burke (1931, CCA-9), 50 F. 2d 653;

U. S. v. Dudley (CCA-9), 64 F. 2d 743;

U. S. v. Gower (1931), 50 F. 2d 370;

Barksdale v. U. S. (1931), 46 F. 2d 762: ("Medical men indulge, very generally, in theorizing on the affairs of life, while the living of life is a very practical affair.");

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d 665;

32 C. J. S., "Evidence", Sec. 559 "a", pp. 389-394; Sec. 569 "c", p. 396; Sec. 572, p. 416 *et seq.* (citing 9th Cir.).

And this court has stated, recently, that where medical testimony is conflicting, "we accept the interpretation which *supports* the judgment."

Maryland Casualty Co. v. Stark (1940, CCA-9), 109 F. 2d 212 (citing 5 C. J. S., pp. 425, 426, n. 31);

Fidelity & Cas. Co. v. Griner (1930, CCA-9), 44 2d 706, 707.

See, also, I, (6), (8), (13), (14) and (B), Appellee's "Summary of the Evidence," this Brief.

XIX.

Kelley's Answers to Q. 27 Were Not "Fraud," Sufficient to Avoid the Policy.

As hereinbefore stated, it is difficult to glean from appellant's brief just how or in what manner the insured's answers to the complex Question 27 were "fraudulent." Does it claim that Kelley had been "ill," as "illness" is commonly understood, that the illness was of sufficient severity so that he could not have forgotten about it, and that his denial was knowingly false and made with the intention to deceive?

Then, Your Honors, *what* "illness" does appellant refer to?

Does it claim that he "contracted a disease," as "disease" is commonly known, and if so, what disease?

Does the appellant claim that he should have set forth that he had syphilis, when there is not a word of testimony that he ever *knew* he had that malady? Dr. Burstein testified that he examined Kelley; that it was a rou-

tine examination to determine entitlement to compensation or pension; that he did not advise Kelley as to the result of his findings and that he had no authority to do so [R. 116-118]. The result of the Wasserman was not disclosed to Dr. Burstein until three days *after* Kelley left the Veterans' Administration [R. 109, 113]. It was *never* disclosed to Kelley.

Does appellant rely wholly upon the statements *made by Kelley* in his applications for disability pension [R. 75-78] or compensation [R. 82-87] wherein Kelley *claimed* he had "Rheumatism, Heart trouble, trouble with spine" as the "uncontradicted testimony" that Kelley actually *had* one or more of these "diseases" in such a degree as to make his denial in his insurance application "fraud" as a matter of law? If so, which of these disorders?

Or does appellant claim Kelley's denials that he (1) ever suffered any injury, (2) been prevented by ill health from attending his usual occupation, or (3) consulted a physician in regard to his health since date of discharge were fraudulent and if so, which of these?

Appellee asks these questions advisedly; for example, appellant refers in its brief as Kelley's reference in his compensation claim to having been in "Base Hospital 48"; that was, of course, *before* Kelley's "date of discharge." Just what unspecified errors is the appellee supposed to hunt out and meet? Or is appellant raising points for the first time, on appeal?

At the outset, appellee urges, with emphasis, that as the jury, by its general verdict, determined that the Insurance Section knew the contents of the claims for compensation

and pension, and the diagnosis of Kelley's disabilities, and knew that the *Veterans' Administration doctors* believed he had aortitis and syphilis, and waived the misrepresentation (XVI, this Brief), then any question as to whether Kelley's answers were true or false becomes immaterial, and the jury's verdict, on conflicting evidence, weighed by the "law of the case" (II, this Brief), was conclusive.

Any conflicts between Kelley's statements in his insurance application [R. 58, 59] and in his claims for disability pension [R. 75-78] or compensation [R. 82-87] were not conclusive evidence of fraud; nor were his *claims* made in the pension or compensation application that he had certain disorders, conclusive against the appellee or proof that he had had any such disorders; those, like other conflicts, were not questions of law, but questions of *fact* for the determination of the *jury*.

So. Dev. Co. v. Silva (1888), 125 U. S. 247, 258, cited by appellant on p. 9, its Brief;

Berry v. U. S. (1941), 312 U. S. 450, 61 S. Ct. 637;

Jones v. U. S. (1940), 112 F. 2d 282;

Northwestern etc. Ins. Co. v. Cohn (CCA-9), 102 F. 2d 74;

Bailey v. U. S. (1937), 92 F. 2d 456: Where various statements made by insured cannot be reconciled with others made by him in his insurance application, it is for the jury to say which statements were true and which were false, which were innocently and which fraudulently made;

Sentinel Life Ins. Co. v. Blackmer (1935), 77 F. 2d 347;

U. S. v. Jorgensen (1933, CCA-9), 66 F. 2d 292;

U. S. v. Francis (1933, CCA-9), 64 F. 2d 865;

U. S. v. Dudley (1933, CCA-9), 64 F. 2d 743;

U. S. v. Albano (CCA-9), 63 F. 2d 677, 681;

U. S. v. Tyrakowski (1931), 50 F. 2d 766, 770:

“Which (statements), if any, were true, is not within our province to decide. Those matters were questions of *fact* for the trial court.”;

U. S. v. Meserve (1930, CCA-9), 44 F. 2d 549, 552;

Hayden v. U. S. (1930, CCA-9), 41 F. 2d 614;

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d 176; *cert. den.* 281 U. S. 744, 50 S. Ct. 350;

La Marche v. U. S. (1928, CCA-9), 28 F. 2d 828;

Nelson Bros. v. Perryman (1931), 48 F. 2d 99.

Strouse v. Union Indemnity Co. (1933), 67 F. 2d 528, 531:

“Although the (insured) had admitted in a prior application for other insurance that he had had a rupture, this was not conclusive. It was for the jury to determine whether the plaintiff’s statement . . . was true or false.”

Appellant concedes (as it must) that a representation is not fraudulent, to permit avoidance of the policy, unless made with *knowledge* of its falsity (p. 9, its Brief, and XV, this Brief). As also elsewhere noted in this Brief, the jury had a right to conclude that Kelley’s answers in his application for compensation and pension were untrue, and that those in his application were true. This they might well have done, for Dr. Burnstein had seen

Kelley only once, and his testimony was not conclusive; whereas Dr. Lenker, the railroad doctor, who knew Kelley over a period of years, and who examined Kelley for the policy, found none of the ailments mentioned by Kelley in the compensation or pension applications, and from the fact that Kelley daily performed strenuous tasks, in his vocation, without loss from work. (See, please, 1, subs. 5, 6, 7, 13, 14, "Summary of Evidence," this Brief).

That Kelley lost no time from his vocation is a fact which the jury had a right to consider in determining whether or not he was in good health, in fact, and whether or not he was guilty of fraud.

Jones v. United States (1940), 12 F. 2d 282;

Northwestern Mut. Life Ins. Co. v. Wiggins
(1927, CCA-9), 15 F. 2d 646, cert. den. 273
U. S. 746, 47 S. Ct. 448.

"The intent to deceive in misrepresenting past illness is a question for the jury." [R. 183, 184.]

Prudential Ins. Co. v. Winn (1934, CCA-9), 71
F. 2d 126;

Majestic Sec. Corp. v. Commissioner (1941), 120
F. 2d 12: ("Intent is a fact to be established
by the party having the burden of proof.");

United States v. Robins (1941), 117 F. 2d 145;

Sentinel Life Ins. Co. v. Blackmer (1935), 77
F. 2d 347: (Misrepresentation is not "false"
unless intentionally and wilfully untrue);

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d
665.

Conflicts in the testimony as to the condition of health of the applicant, raises a question of *fact*, to be determined by the *jury*.

Moulor v. American Life Ins. Co., 111 U. S. 335, 343, 4 S. Ct. 446, 470;

Maryland Cas. Co. v. Stark (1940, CCA-9), 109 F.2d 212: (Where medical testimony is conflicting, this court said that "we accept the interpretation which supports the judgment.");

Bailey v. United States (1937), 92 F. 2d 456;

United States v. Bodge (1936), 85 F. 2d 433;

Mutual Life Ins. Co. v. Frey (1934, CCA-9), 71 F.2d 259: (The insured died from chronic heart disease two months after the policy was delivered; the evidence was conflicting; held, jury question);

United States v. Tyrakowski (1931), 50 F. 2d 766, 770;

Fidelity & Cas. Co. v. Griner (1930, CCA-9), 44 F. 2d 706, 707: (Although the evidence offered by the losing party showed the insured had an organic disease, this Court said: "We must assume that the deceased was in perfect health," as that was an issue determined by the jury);

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d 176, *cert. den.* 281 U. S. 744, 50 S. Ct. 350;

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d 665;

N. Y. Life Ins. Co. v. Moats (1913, CCA-9), 207 Fed. 481;

Jones v. United States (1940), 112 F. 2d 282;

Northwestern Mutual v. Cohn (1939, CCA-9), 102 F. 2d 74;

Mutual Life Ins. Co. v. Frey (1934, CCA-9), 71 F. 2d 259: (This court again said, citing *Northwestern v. Wiggins*, 9 Cir., 16 F. 2d 646, that "good health," "illness" and "disease" must be considered, in an application for insurance, not in the light of scientific technical definitions, but in the light of the insured's understanding of the terms.)

Where medical testimony is conflicting this court has stated the rule to be that it should accept the interpretation which supports the judgment.

Maryland Cas. Co. v. Stark (1940, CCA-9), 109 F. 2d 212.

The non-disclosure of a disease which is latent, the existence of which is unknown to the applicant, will not avoid the policy or relieve the insurer of liability.

Mays v. New Amsterdam Cas. Co. (1913), 40 App. D. C. 249, *Cert. den.*, 238 U. S. 624, 35 S. Ct. 662;

Jeffress v. N. Y. Life Ins. Co. (1935), 74 F. 2d 874.

If the insurer wished to relieve itself in instances where the non-disclosure was of a disease of which the insured had no knowledge, it could so provide in the policy; and the absence of such a provision, the court would not read such a provision into its terms.

Mouler v. Amer. Life Ins. Co., 4 S. Ct. 466, 469, 111 U. S. 335;

Pilot Life Ins. Co. v. Dickinson (1938), 93 F. 2d 765, 766, 767.

Where the question, as here, was whether the insurer consulted a "physician" [R. 59, Q. 27], treatment by a chiropractor is excluded and need not be disclosed. Only a legally licensed physician or doctor of medicine was contemplated.

Jackson v. Nat'l Life, etc. Co. (1939), 90 P.2d 1097, 150 Kan. 86 (chiropractor);

N. Y. Life Ins. Co. v. Modzelewski (1934), 255 N. W. 299, 267 Mich. 296 (chiropractor);

Le Grand v. Security Ben. Assn. (1922), 240 S. W. 852, 210 Mo. App. 700 (osteopath);

Western, etc. Ins. Co. v. Angel (1922), 134 N. E. 671, 77 Ind. App. 665;

Isaacson v. Wisconsin Cas. Assn., 203 N. W. 918;

Sec. 2409, Calif. Business and Professions Code, Sec. 15, Act. 4811, Deering's "General Laws of Calif.," 1937 Ed.

Being examined by a physician is not "consulting a physician" and the examination of the deceased veteran by Dr. Burstein, who testified that he told the veteran nothing, and did not prescribe for him, or give him any advice, was not a "consultation" and hence the answer of the veteran was not false or a misrepresentation.

Mutual Reserve Life Ins. Co. v. Dobler (CCA-9), 137 Fed. 550.

For "consult" means to discuss something together, to ask advice; giving advice as to proper treatment to be pursued; receiving professional advice; an examination for the purposes of treatment and the term does *not* include

an examination for the purpose of securing a pension, or a routine examination [R. 116].

Halverson v. United States, 121 F.2d 420, *cert. den.* 62 S. Ct. 412, cited by appellant p. 14, its Brief;

Atlantic Life Ins. Co. v. Stringer, 28 F.2d 665;

Harvey v. Metropolitan Ins. Co., 62 A. 600, 602;

Winn v. Modern Woodman, 137 S. W. 272;

Union Pacific v. Graddy, 41 N. W. 809;

Scofield v. Metropolitan Ins. Co., 64 A. 1107, 1109;

Modern Woodman v. Miles, 97 N. E. 1009;

Elliot v. Grand Lodge, 95 S. W. 2d 829, 833;

Nat'l Americans v. Ritch, 180 S. W. 488, 489;

N. Y. Life Ins. Co. v. Franklin, 87 S. E. 584, 587;

Mutual Reserve v. Dobler (CCA-9), 137 Fed. 550, 556;

Farmers Ins. Co. v. Dalheim, 24 N. Y. Supp. 2d 89, 91;

No. Life Ins. Co. v. King (CCA-9), 53 F.2d 613, *cert. den.* 285 U. S. 544, 52 S. Ct. 394;

Prudential Ins. Co. v. Winn (CCA-9), 71 F.2d 126.

Nor was the insured "treated" by Dr. Burstein: for being "treated" implies medical treatment, including care: asking and seeking advice; and Dr. Burstein testified he gave neither [R. 116-118].

Mod. Woodmen v. Miles, 97 N. E. 1009, 1010;

Rodriques v. Life Ins. Soc., 145 S. W. 2d 1077, 1080: (where insured lost no time from work; whether "treated" by a physician, held *jury question*).

Nor is the insured required to disclose the fact of consulting a physician for slight or temporary ailments; the jury had the right to believe that if he had any ailment prior to making the application, the same came under this rule, (1) from the report of perfect health made by the medical examiner at the time the insurance was applied for; (2) the insured's uninterrupted work record; (3) the letter to him by the Veterans' Administration that his disability was less than 10%—to-wit: from 0% to 9%, surely of slight degree to the mind of the insured.

Wharton v. Aetna Life Ins. Co., 48 F.2d 37 (citing *Mutual Reserve v. Dobler* (CCA-9), 137 Fed. 550, with approval);

Ocean Accident Co. v. Rubin (CCA-9), 73 F.2d 157;

N. Y. Life v. Moats (CCA-9), 207 Fed. 481: (holding that whether answers were knowingly false, in an action by a beneficiary, is for the jury and motion for judgment *non obstante verdicto* was properly denied);

Mutual Life Ins. Co. v. Selby (CCA-9), 72 Fed. 980;

N. Y. Life Ins. Co. v. King (CCA-9), 53 F.2d 613, *cert. den.* 285 U. S. 544, 52 S. Ct. 394;

Prudential Ins. Co. v. Winn (CCA-9), 71 F.2d 126.

Whether an insured's statement that he had not "consulted" or been "attended" by a physician constitutes fraud is a question of fact for the jury.

Prudential Ins. Co. v. Winn (1934, CCA-9), 71 F.2d 126: (where insured consulted three physicians, contrary to his statement, but took no treatments from them and a doctor who subsequently examined him found that his disorders were temporary and not serious).

From the letter the Government wrote Kelley [Ex. H, R. 128-129], the jury had a right to infer and conclude that Kelley understood from the letter that the only disorder which its doctors found was "aortitis" and that it was of little significance; and from the terms "mild" and "less than 25%," and from the letter's denial of his claim because his disability did not exist "to a degree of 10% or more," he had a right to assume that the disorder was 0% or 1%: and that weighed with his regularity of employment, he honestly and in good faith believed that the disorder did not constitute a "disease" or make him other than in "good health." (See I, subs. (14), (13), (10), (D), (5), (6), (H), (K), (L) and (M), appellee's "Summary of the Evidence," this Brief.)

United States v. Golden, 34 F. 2d 367, at 373:

"The government, through its doctors, knew more about the prospect of (plaintiff's) recovery than he did. The plaintiff had a right to rely upon their statements; they were skilled in medicine, he was not.

"Furthermore, the representation that he was not totally and permanently disabled, implied by his application, was induced by the representations of the government doctors. Certainly one party, whose own agents inducted the misstatement, if there was one, cannot claim estoppel against the other, who relied thereon."

If appellee's manner of handling this "point" [as to Q. 27] has not been as clear-cut as Your Honors would have desired, it is submitted that the appellant was not very helpful in specifying the particulars wherein it claimed the insured's answers to Questions 25, 26 and 27 *compelled* a verdict in its favor. The appellee-beneficiary urges that

viewing the evidence, as this Court has stated it must, with the presumptions and inferences drawn in favor of the insured, and in the light of "law of the case," the appellant did not establish legal fraud by clear, cogent, convincing and satisfactory proof, and that at the most, only conflicts were created; and as to them, the general verdict of the jury was conclusive (see, please, I, subs. "A" to "M," incl., this Brief).

XX.

There Is No Federal General Common Law.

Alameda Co. v. United States (1942, CCA-9), 124 F. 2d 611;

Erie R. Co. v. Tompkins, 304 U. S. 64, 78; 58 S. Ct. 817, 822; 114 A. L. R. 1487.

XXI.

Law, Between Insured and Insurer, Generally, Applies.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Lynch v. United States (1934), 292 U. S. 571, 54 S. Ct. 840, 843.

XXII.

Judgment Should be Affirmed for Lack of Proper Specification of Errors (Rule 20, Sub. 2, "d," Rules, CCA 9th Cir.)

The Specification of Errors relied on by the appellant [p. 2, its Brief, and R. 165-166] is that the defendant had established, as *a matter of law*, that the policy sued upon had been obtained by fraudulent representations made by the insured in his application for the policy.

Such lack of specific designation of error not only makes it impossible for the appellee to get to and answer the "vital issues," and increases the labors of this Court, but the failure to observe Rule 20, sub. 2(d) is ground for affirmance of the judgment.

Rule 20, sub. 2(d), Rules, CCA, 9th Circuit;

O'Brien, "Manual of Fed. App. Proc.," 3d Ed. (1941), pp. 209-211, and cases cited notes 5, 7, 8, 16, 17;

Humphreys Gold Corp. v. Lewis (1937, CCA-9), 90 F.2d 896, 898, 899.

By reference to the "Summary of the Argument" (p. 4, its Brief), it will be noted that under paragraph "2" thereof, and also pages 15-17, appellant raises a point not included in the Specifications, and one not properly before this Court, as there has been no cross-appeal by the appellee. Under its paragraph "1," the appellant apparently relies upon a reversal, based on its claim that the uncontradicted evidence showed that the answers of the insured to Question 13 (a) [R. 58], and Question 27 [R. 59] were misrepresentations made by the insured with (1) knowledge of their falsity, and with (2) intent to deceive,

and (3) that the Government relied thereon. Just what parts of the complex Question 27 were falsely answered, appellant does not state. Neither this Court nor an appellee should be required to search for "scattered and dissipated" specifications of error. (See six opening paragraphs, "point" XIX, this Brief, for typical illustration.)

XXIII.

Conclusion.

It is conceded that there are decisions, which under a different set of facts, reach a conclusion apparently adverse to the appellee, here.

"In reading a judicial opinion to determine the rule of law laid down, the language of the court must be read in the light of the facts before it."

United States v. Thompson (1937, CCA-9), 92 F.2d 135;

Commissioner v. W. U. Life Ins. Co. (1932, CCA-9), 61 F.2d 207;

Julian Pet. Co. v. Courtney (1927, CCA-9), 22 F.2d 360;

Tomlinson v. Coe (1941), 123 F.2d 65.

This court has frequently stated that in these Government insurance cases, more than any others, the facts in one case vary greatly from those in the next. It is also respectfully submitted that the Court's attention to one phase of the law may be made with considerable emphasis in one case, and not referred to in the briefs of either party, in the next. In some, the doctrines of the "law of the case" and waiver or non-reliance, were not applicable, as they are here.

That there were conflicts in the evidence, that presumptions and inferences favored the insured, that the Veterans' Administration *had* knowledge of all the facts before it issued the policy, that the jury was not *bound* by the testimony or findings of Government doctors, or even that Mr. Posey testified at all, has been evidently overlooked by the appellant.

Appellee urges that the judgment should be affirmed for want of proper or sufficient specifications of error (XXII, this Brief). And if not for that reason, then since all questions of fact were fully and fairly presented to the jury, upon instructions acceptable to the appellant, and the jury's general verdict was for appellee, and the District Judge refused to disturb the verdict, the judgment should be affirmed.

Respectfully submitted,

SYLVESTER HOFFMANN,

Attorney for Appellee.

September, 1942.

No. 10027

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

ROSETTA ALICE KELLEY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

APPELLANT'S REPLY BRIEF

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FILED

OCT 10 1912

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APPELLANT'S REPLY BRIEF

FOREWORD

The principal purpose of this reply brief is to answer the appellee's contentions based upon the trial court's charge to the jury (R. 171-188) and the deposition of Richard B. Posey (R. 191-230), neither of which, except for small portions of Mr. Posey's deposition (R. 90-107) (in effect conceded by the appellee to be immaterial (Br. 7)), were in the record as printed and filed in this Court when the Government's original brief was filed. (They were added later pursuant to stipulations (R. 169-170, 189) which were sought by the appellee after she had previously stipulated that the portions of the deposition in the original record were sufficient (R. 168). Under the circum-

stances the appellee is scarcely justified in her statement that the Government "ignores" Mr. Posey's deposition (Br. 2)).

THE APPELLEE'S CONTENTIONS AS TO KNOWLEDGE ON THE PART OF THE INSURANCE SECTION OF THE FALSITY OF KELLEY'S REPRESENTATIONS THAT HE HAD NOT APPLIED FOR COMPENSATION OR PENSION ARE WITHOUT MERIT

There is no merit, we submit, in the appellee's contentions that the evidence justified a finding that the Insurance Section, before approving Kelley's application for insurance, made an investigation and knew (1) that his negative answers to the questions as to whether he had ever applied for compensation or pension were false and (2) that the Government doctors had discovered the aortitis and syphilis (Br. 9). The existence of those diseases was manifestly inconsistent with good health required by the statute. And the presumption of regularity of official acts would preclude a finding, in the absence of substantial evidence to support it, that the Insurance Section had approved the application without further investigation or examination, with knowledge that the reports of examinations made by a medical board of Government physicians and of a laboratory finding disclosed the existence of such diseases less than seven months previously.

The appellee's contention that her position is supported by Mr. Posey's deposition will not bear analysis. The deposition contains nothing to justify an inference that the Insurance Section, at the time in question, was in fact aware of the discovery of the diseases or even that it was aware that Kelley had

applied for compensation. Mr. Posey deposed in this connection that the Insurance Section was instructed to rely on the answers in an application for insurance (R. 199). In the instant case these included, of course, the negative answers to the questions as to whether Kelley had ever applied for compensation, training allowance, Government insurance, or pension (R. 58). There is no reason to infer that knowledge on the part of the Insurance Section of the existence of a "C" number for Kelley would put them on notice that any of the answers were false. As Mr. Posey in effect deposed, the existence of a "C" number for a person showed merely that there was a "C" file for him in the Central Office of the Veterans' Administration at Washington "whether or not it was compensation or what not" (R. 218). Compensation, training allowances, insurance, or pensions (disability allowances) are not the only benefits which a World War veteran was eligible to claim. He might, for example, merely have sought dental treatment for which the statute also provided (Act of August 9, 1921, c. 57, sec. 13, 42 Stat. 147, 152, World War Veterans' Act, 1924, as amended, sec. 202 (r), 38 U. S. C. A. 483).

The appellee, moreover, has misinterpreted Mr. Posey's deposition to the effect that it was "quite probable" that a copy of the physical examination of October 1931, was on file with the Insurance Section before it approved the insurance application (Br. 6, 33). Mr. Posey deposed in this connection merely that it as "quite possible" that a copy of the report was in the "C" file at that time. He used the phrase

“quite probable” only in adding that if an award of benefits had been made, it was “quite probable it had been received by this time” (R. 220-221). No award of benefits had been made to Kelley. Both of his claims had been disallowed. It is submitted that Mr. Posey obviously did not mean that, in the absence of an award of benefits, there was more than a possibility that a copy of the report had reached Washington at the time in question. In any event, he deposed that he did not think that the Insurance Section “drew the C file” (R. 217).

Moreover, the court instructed the jury to the effect that even if the report were in the file concerning the claim for compensation, knowledge of its contents was not to be imputed to the Director in passing on the application for insurance (R. 184). The appellee, moreover, did not except to this instruction and, under the principle which she herself invoked (Br. 1, 12-15), the rule of law applied by that instruction became the law of the case. In any event, the instruction is wholly in accord with the principle announced by this Court in *United States v. Riggins*, 65 F. (2d) 750, rehearing denied July 1933 which, as stated in the Government’s original brief (p. 14), has been applied in other cases where the facts were substantially identical with those in the instant case. In the *Riggins* case it was said (p. 751) that the plaintiff “deliberately and intentionally made a false statement in his own behalf to secure an advantage over the Government of the United States. There is no reason why he should be heard to say that the government did not rely upon

his statements.” It would seem manifest that the same rule is equally applicable to the appellee in the instant case.

THERE IS NO MERIT IN APPELLEE'S CONTENTION TO THE EFFECT THAT THE GOVERNMENT IS PRECLUDED FROM MAINTAINING ITS CONTENTIONS BY THE COURT'S CHARGE TO THE JURY TO WHICH NO EXCEPTION WAS TAKEN

The appellee appears to contend that the Government is precluded from urging that the denial of its motion for a directed verdict was erroneous by the court's instructions to the jury in regard to presumptions to which no exception was taken by either party (Br. 24). It is submitted, however, that the trial court, having denied the motion for a directed verdict, had no occasion to and did not include in its instructions to the jury any rule of law relating to the effect of a presumption applicable to its ruling on the motion. The portion of the charge upon which the appellee chiefly relies, to the effect that the presumptions of innocence of crime or wrongdoing on the part of Kelley and of fairness and regularity in his transactions with the Government were “evidence,” was manifestly not intended by the court as the announcement of a rule that such presumptions themselves constituted evidence sufficient alone to take the case to the jury. For the court made it clear that such a presumption “remains as evidence in the case” only until “rebutted by a preponderance of contrary evidence” and that it “disappears * * * if the defendant produces sufficient evidence to preponderate against it.” If, however, the meaning of the instruction were left in doubt in this connection, it should be construed in favor of the Government, since no such force and

effect as that urged by the appellee may be given to such a presumption in determining the sufficiency of the evidence to present a jury question in a case where, as here, the determination of that question involves the construction of a federal statute. In the instant case, the question presented by the motion for a directed verdict was whether the evidence compelled a finding of fraud, within the meaning of the provision in Section 307, World War Veterans' Act, 1924, as amended, 38 U. S. C. 518, that "policies of insurance * * * shall be incontestable * * * except for fraud, * * *." Contrary to the view apparently urged by the appellee, the effect of the presumptions in question in that connection is not governed by local statutes or decisions but by federal law. In *Prudence Realization Corporation v. Geist*, No. 757, October Term 1941, decided April 27, 1942, 62 S. Ct. 978, 982, 316 the Supreme Court said, "In the interpretation and application of federal statutes, federal not local law applies." And see *Alameda County v. United States*, 124 F. (2d) 611, 616, upon which the appellee relies (Br. p. 50), in which this Court suggested that the statement in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78 (also relied on by the appellee (Br. 50)) that there "is no federal general common law" was too broad because it was apparent from previous decisions of the Supreme Court that such law applies where a federal statute controls.¹ That federal, not local, law is ap-

¹ A similar view was expressed by Mr. Justice Jackson in a concurring opinion in *Doench, Dukme & Co. Inc. v. F. D. I. C.*, 315 U. S. 447, 469, et seq. which, it will be noted, was decided prior to *Prudence Realization Corporation v. Geist*, *supra*.

plicable in determining the sufficiency of the evidence to present a jury question in a war-risk insurance case where, as here, the Government's defense is based upon fraud, is further shown by the recent decision of the Supreme Court in *Pence v. United States*, No. 665, October Term, 1941, decided May 11, 1942, 316 U. S. 332, 62 S. Ct. 1080, in which it was held that statements, as in the instant case, made by the deceased insured in conflict with the representations in his application for insurance, compelled the conclusion that he had obtained his insurance by fraud and required the direction of a verdict in favor of the Government. It should be noted, moreover, that the decision in that case disposed of a contention, similar to one made by the appellee in the instant case (Br. 9, 41, 42) that conflicts between representations in the application for insurance and representations in the insured's claims for compensation and other benefits presented a question for the jury as to which of the conflicting representations were true.

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OCTOBER 1942.

John
No. 10266

115
United States ⁵
Circuit Court of Appeals
For the Ninth Circuit.

LA VERNE CO-OPERATIVE CITRUS ASSOCIATION, a
corporation, GLENDORA CO-OPERATIVE CITRUS AS-
SOCIATION, a corporation, VENTURA ORANGE AND
LEMON ASSOCIATION, a corporation, WHITTIER
MUTUAL ORANGE & LEMON ASSOCIATION, a cor-
poration, INDEX MUTUAL ASSOCIATION, a corpora-
tion and CHULA VISTA MUTUAL LEMON ASSO-
CIATION, a corporation, organized and existing under the
laws of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV - 3 1942

United States
Circuit Court of Appeals
For the Ninth Circuit.

LA VERNE CO-OPERATIVE CITRUS ASSOCIATION, a corporation, GLENDORA CO-OPERATIVE CITRUS ASSOCIATION, a corporation, VENTURA ORANGE AND LEMON ASSOCIATION, a corporation, WHITTIER MUTUAL ORANGE & LEMON ASSOCIATION, a corporation, INDEX MUTUAL ASSOCIATION, a corporation and CHULA VISTA MUTUAL LEMON ASSOCIATION, a corporation, organized and existing under the laws of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles, Calif.

In the District Court of the United States
In and for the Southern District of California
Central Division

No. 1596-BH

Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LaVERNE CO-OPERATIVE CITRUS ASSO-
CIATION, a corporation, GLENDORA CO-
OPERATIVE CITRUS ASSOCIATION, a
corporation, and UPLAND ORCHARDS,
INC., a corporation,

Defendants.

No. 1597-BH

Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VENTURA COUNTY ORANGE AND LEMON
ASSOCIATION, a corporation,

Defendant.

No. 1620-BH

Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WHITTIER MUTUAL ORANGE AND LEMON
ASSOCIATION, a corporation,

Defendant. [1*]

No. 1635-BH

Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

INDEX MUTUAL ASSOCIATION,
a corporation,

Defendant.

No. 110-Civil-SD (BH)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHULA VISTA MUTUAL LEMON ASSOCIA-
TION, a corporation organized and existing
under the laws of California,

Defendant.

*Page numbering appearing at foot of page of original certified
Transcript of Record.

AGREED STATEMENT OF THE CASE FOR
USE ON APPEAL, UNDER RULE 76 OF
THE RULES OF CIVIL PROCEDURE.

The above entitled five cases, together with five other cases of the same nature, in all of which the United States of America was plaintiff, and in all of which the same relief was sought, were consolidated for trial and were tried as such in the above entitled Court.

This agreed statement of the case is prepared and agreed to for use on and in connection with the appeal of the appealing defendants in each of the following designated five cases, to-wit:

No. 1596-BH

Civil

No. 1 UNITED STATES OF AMERICA,
Plaintiff,

vs.

LaVERNE CO-OPERATIVE CITRUS
ASSOCIATION, a corporation,
GLENDORA CO-OPERATIVE
CITRUS ASSOCIATION, a corpo-
ration, and UPLAND ORCHARDS,
INC., a corporation,
Defendants. [2]

No. 1597-BH

Civil

No. 2 UNITED STATES OF AMERICA,
Plaintiff,

vs.

VENTURA COUNTY ORANGE AND
LEMON ASSOCIATION, a corpo-
ration,

Defendant.

No. 1620-BH

Civil

No. 3 UNITED STATES OF AMERICA,
Plaintiff,

vs.

WHITTIER MUTUAL ORANGE AND
LEMON ASSOCIATION, a corpo-
ration,

Defendant.

No. 1635-BH

Civil

No. 4 UNITED STATES OF AMERICA,
Plaintiff,

vs.

INDEX MUTUAL ASSOCIATION,
a corporation,

Defendant.

No. 110-Civil SD (BH)

No. 5 UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHULA VISTA MUTUAL LEMON
ASSOCIATION,

Defendant.

For the sake of convenience and to abbreviate
the record,

Case No. 1 will be designated as the LaVerne
Case,

Case No. 2 as the Ventura Case,

Case No. 3 as the Whittier Case,

Case No. 4 as the Index Case, and

Case No. 5 as the Chula Vista case. [3]

LA VERNE CASE.

In the District Court of the United States
In and for the Southern District of California
Central Division

No. 1596-BH

UNITED STATES OF AMERICA,
Plaintiff,

v.

LA VERNE COOPERATIVE CITRUS ASSO-
CIATION, a corporation; GLENDORA CO-
OPERATIVE CITRUS ASSOCIATION, a
corporation; UPLAND ORCHARDS, INC., a
corporation,

Defendants.

COMPLAINT TO ENJOIN VIOLATIONS OF
ORDER OF THE SECRETARY OF AGRICULTURE

I.

This action is brought by the United States, through the United States Attorney for the Southern District of California, under the direction of the Attorney General of the United States, and at the request and under the authority of the Secretary of Agriculture of the United States.

II.

The defendant LaVerne Co-Operative Citrus Association is a corporation organized and existing under the laws of the state of California and has its principal place of business at 1941 Lincoln Avenue, La Verne, Los Angeles County, California.

III.

The defendant Glendora Co-Operative Citrus Association is a corporation organized and existing under the laws of the state of California and has its principal place of business at South Vermont Avenue and Santa Fe Tracks, Glendora, Los Angeles County, California.

IV.

The defendant Upland Orchards, Inc., is a corporation organized and existing under the laws of the state of California and has [4] its principal place of business at 225 Stowell Street, Upland, Los Angeles County, California.

V.

This proceeding is brought under section 8a (6) of the Act of May 12, 1933 (48 Stat. 31, U.S.C., Title 7, section 608a (6), as amended August 24, 1934, 49 Stat. 672) and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public No. 137, 75th Congress) (the said Act of May 12, 1933, as reenacted and amended being hereinafter referred to as "the Act"), investing the several District Courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the Secretary pursuant to the provisions of Title I of said Act. The purpose of the proceeding is specifically to enforce the provisions of a certain Order known as Order No. 53, "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," issued by the Secretary of Agriculture of the United States, pursuant to section 8c of Title I of the said Act, and also to prevent and restrain the defendants from handling lemons in the current of interstate commerce or in foreign commerce with Canada or so as directly to burden, obstruct, or effect such commerce in such lemons in violation of the provisions of the Order. A copy of the Order is attached hereto, marked "Exhibit A," and made a part hereof.

VI.

As hereinafter used the term "Order" means the said Order No. 53, "Regulating the Handling

of Lemons Grown in the State of California and Arizona;" the term "Secretary" means the Secretary of the United States; the term "lemons" means lemons grown in the states of California and Arizona; the term "handling" means only such handling of lemons as is in the current of interstate or foreign commerce with Canada or which directly burdens, obstructs, or affects such commerce in such fruit; and the term "handler" or "shipper" means any person [5] engaged in such handling.

VII.

Pursuant to and by virtue of the authority vested in the Secretary by section 8c (3) of the Act, and in accordance with General Regulations, Series A, No. 1 of the Agricultural Adjustment Administration, United States Department of Agriculture, the Secretary on October 3, 1940, gave to all interested persons, including the defendants, and to each of them, due notice of a public hearing to be held in the city of Los Angeles, state of California, on October 21, 1940, with respect to a proposed order regulating the handling of lemons grown in the states of California and Arizona. The hearing was held pursuant to, and in accordance with, said notice and regulations. All interested persons, including defendant, were afforded full opportunity to be heard concerning the proposed Order. A copy of General Regulations, Series A, No. 1, and amendment thereto, is attached hereto, marked "Exhibit B," and made a part hereof.

VIII.

The Secretary found from the evidence introduced at the said hearing that the issuance of the Order regulating the handling of lemons grown in the state of California and the State of Arizona, and all the terms and conditions of the Order, would tend to improve marketing conditions respecting the handling of such lemons in the channels of interstate and foreign trade and commerce with Canada, and would tend to effectuate the declared policy of Title I of the Act relating to the establishment of marketing conditions for such lemons moving in such channels of trade and commerce and, acting pursuant to and by virtue of the authority vested in him by section 8c of the Act, the Secretary accordingly issued the Order on April 5, 1941, setting forth specifically his findings as aforesaid, and his findings of all other facts, the existence of which were requisite to the issuance and effectiveness of the Order. The Order by its terms, became effective on April 10, 1941, and has been continuously in effect thereafter, up [6] to and including the present time.

IX.

The Order is applicable to handlers of lemons grown in the states of California and Arizona. It regulates the handling of such lemons in the same manner as a marketing agreement executed by the Secretary on April 5, 1941, after a public hearing on a proposed marketing agreement, the

parties signatory to which were handlers who handled more than eighty per cent. (80%) of the volume of lemons covered by the Order. The order regulates the handling of lemons in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in the said marketing agreement. The findings of the Secretary relating to the regional application of the Order are set forth in the Order. The Secretary determined, as set forth in the Order, that the issuance of the Order was approved or favored by the producers who, during the year November 1, 1939, to October 31, 1940, both dates inclusive, determined by the Secretary to be a representative period, have produced for market within the states of California and Arizona at least two-thirds of the volume of such lemons produced for market within such production area during the said period.

X.

Subsequent to the effective date of the Order and prior to April 23, 1941, and pursuant to the provisions of section 953.2 thereof, the Secretary established a Lemon Administrative Committee and selected the members thereof in accordance with the provisions of said section of the Order, and the said Committee is now and has at all times since the establishment thereof exercised the powers and performed the duties given and required by the Order.

XI.

Defendants Glendora Co-Operative Citrus Association, La Verne Co-Operative Citrus Association, and Upland Orchards, Inc., are, and each of them is, handlers of lemons, engaged in the handling of lemons [7] as the terms are defined in the Order, and the defendant La Verne Co-Operative Citrus Association on or about May 2, 1941, made and filed with the said Committee a written application for a prorate base and for allotments; the defendant Uplands Orchards, Inc., on or about May 2, 1941, also filed a written application with the said Committee for a prorate base and for allotments; the defendant Glendora Co-Operative Citrus Association on or about May 7, 1941, filed with the Committee such a written application for a prorate base and for allotments.

XII.

The Secretary on or about May 31, 1941, and in accordance with the provisions of section 953.4 of the Order, and upon the recommendations of the Lemon Administrative Committee, and upon other available information, fixed and determined prorate bases for all handlers of lemons who applied for a prorate base and for allotments, including defendants and each of them, and established a weekly regulation period for the handling and shipping of lemons, commencing June 1, 1941, and ending June 8, 1941.

XIII.

The Secretary, acting pursuant to, and in accordance with, provisions of the Order, and upon the basis of the recommendation of the Lemon Administrative Committee, and upon other available information, fixed the quantity of lemons which could be handled and shipped from California and Arizona in interstate commerce and foreign commerce with Canada during the weekly regulation period fixed by him, beginning June 1, 1941, and ending June 8, 1941, as aforesaid, at six hundred and fifty (650) carloads of lemons.

XIV.

For the said weekly regulation period, beginning June 1, 1941, and ending June 8, 1941, the Secretary fixed an allotment for the defendant La Verne Co-Operative Citrus Association at three thousand, five hundred, and fifty-seven (3,557) packed boxes of lemons so that the largest amount of lemons which defendant could lawfully ship in [8] the current of interstate commerce or foreign commerce with Canada during the said weekly regulation period, including an overshipment privilege in the amount of four hundred and six (406) packed boxes of lemons, under the applicable provisions of the Order was three thousand, nine hundred, and sixty-three (3,963) packed boxes of lemons.

XV.

The defendant, during the weekly regulation period specifically mentioned above and in the regular

course of its business, has sold, handled and shipped lemons in the current of interstate commerce and foreign commerce with Canada in disregard, defiance and violation of the applicable provisions of the Order and of the regulations issued thereunder.

XVI.

During the weekly regulation period beginning June 1, 1941, and ending June 8, 1941, said defendant La Verne Co-Operative Citrus Association shipped and handled six thousand, five hundred and sixty-one (6,561) packed boxes of lemons of which number two thousand, five hundred and ninety-eight (2,598) packed boxes were shipped by defendant in violation of the Act and of the Order, as follows:

Date	From	To	No. of boxes in violation
6/5/41	La Verne, California	Denver, Colo.	15
6/5/41	La Verne, California	Harlem River, N. J.	406
6/6/41	La Verne, California	Milwaukee, Wis.	406
6/6/41	La Verne, California	Jersey City, N. J.	406
6/6/41	La Verne, California	St. Louis, Mo.	208
6/6/41	La Verne, California	Louisville, Ky.	345
6/7/41	La Verne, California	Philadelphia, Pa.	406
6/7/41	La Verne, California	El Paso, Texas	406

XVII.

For the said weekly regulation period, beginning June 1, 1941, and ending June 8, 1941, the Secretary fixed an allotment for [9] the defendant Gledora Co-Operative Citrus Association at two hundred and eighty-eight (288) packed boxes of lem-

ons, so that the largest amount of lemons which defendant could lawfully ship in the current of interstate commerce or foreign commerce with Canada during the said weekly regulation period, including an overshipment privilege in the amount of four hundred and six (406) packed boxes of lemons under applicable provisions of the Order, was six hundred and ninety-four (694) packed boxes of lemons.

XVIII.

The defendant Glendora Co-Operative Citrus Association, during the weekly regulation period specifically mentioned above and in the regular course of its business, has sold, handled, and shipped lemons in the current of interstate commerce and foreign commerce with Canada in disregard, defiance, and violation of the applicable provisions of the Order and of the regulations issued thereunder.

XIX.

During the weekly regulation period, beginning June 1, 1941, and ending June 8, 1941, defendant shipped and handled nine hundred and thirty-five (935) packed boxes of lemons, of which number two hundred and forty-one (241) packed boxes were shipped by defendant in violation of the Act and of the Order, as follows:

Date	From	To	No. of boxes in violation
6/6/41	Covina, California	Waverly, New Jersey	42
6/6/41	Whittier, California	Denver, Colorado	199

XX.

For the said weekly prorate period, beginning June 1, 1941, and ending June 8, 1941, the Secretary fixed an allotment for the defendant Upland Orchards, Inc., at one hundred and twenty-four (124) packed boxes of lemons, so that the largest amount of lemons which defendant could lawfully ship in the current of interstate commerce or foreign commerce with Canada during the said weekly prorate period, including an overshipment privilege in the amount of four hundred and six (406) packed boxes of lemons under applicable provisions of the [10] Order, was five hundred and thirty (530) packed boxes of lemons.

XXI.

The defendant Upland Orchards, Inc., during the weekly prorate period specifically mentioned above and in the regular course of its business, has sold, handled, and shipped lemons in the current of interstate commerce and foreign commerce with Canada in disregard, defiance, and violation of the applicable provisions of the Order and of the regulations issued thereunder.

XXII.

During the weekly prorate period, beginning June 1, 1941, and ending June 8, 1941, said defendant Upland Orchards, Inc., shipped and handled one thousand, six hundred, and twenty-four (1,624) packed boxes of lemons, of which number

one thousand, and ninety-four (1,094) oacked boxes were shipped by defendant in violation of the Act and of the Order as follows:

Date	From	To	No. of boxes in violation
6/5/41	Upland, California	El Paso, Texas	282
6/6/41	Upland, California	El Paso, Texas	406
6/7/41	Upland, California	Denver, Colorado	406

XXIII.

The market for lemons grown in the states of California and Arizona is predominantly interstate in character, and there is active competition for this interstate market among all handlers of lemons in the states of California and Arizona. The defendants are, and each of them is, engaged in handling, selling, and shipping lemons directly in interstate commerce and, in view of the prevailing marketing conditions respecting lemons, the absence of regulation of marketing would adversely affect the movement of lemons in interstate and foreign commerce by causing excessive and untimely moving of such fruit to markets in the United States and Canada with consequent serious fluctuations in the price at which such fruit may be sold by handlers and in the price paid to growers thereof, and would subject the jobbing [11] trade to increased risks through an unstabilized market for such fruits, and cause loss of confidence in the market on the part of all persons engaged in the handling of such lemons. These conditions have in some cases meant a return to growers insufficient to meet the cost of producing

and marketing their fruit and have caused obstructions to the normal flow and distribution of such fruit among the several states of the United States and with Canada. A further result of the disorderly marketing of lemons is to lower the standard of trade in lemons in interstate commerce and in commerce with Canada to the detriment, not only of the growers, but also of all distributors of such fruit in the United States and Canada.

XXIV.

The defendants, and each of them, conduct their business in active and substantial competition with other handlers of lemons complying with the provisions of the Order. The effect of the violations by defendants, and each of them, of the provisions of the Order has been to impair the effectiveness of the program inaugurated by the Order regulating the handling of lemons in interstate commerce and in foreign commerce with Canada in such fruit, to disrupt and obstruct interstate commerce and foreign commerce with Canada in such fruit, to render partially ineffective the lawful regulation of such commerce as provided in the Act and Order, to bring about unstabilized marketing conditions respecting such commerce which have injured and burdened the lemon industry and which Congress has sought to prevent in order to preserve such commerce for the future, and, to defeat the policy of Congress, as declared in the Act, to promote the orderly exchange of commodities

among the several states of the United States and with foreign nations.

The defendants, and each of them, since the effective date of the Order, have failed and refused, and are now failing and refusing, to comply with the terms of the Order, and have indicated that they, and each of them, will violate the provisions thereof in the [12] future. The plan of regulation contained in the Order contemplates the proration and allotment of shipments of lemons from week to week, under conditions specified in the Order.

The continued non-compliance by the defendants, and each of them, with the provisions of the Order is and will be injuries to interstate commerce and foreign commerce with Canada in lemons, and to growers, handlers, and consumers of such fruit, and threatens the stability of such interstate and foreign commerce in lemons. Unless the defendants, and each of them, are immediately required to desist from further violations of the Order, other handlers of lemons will be incited to violate the provisions of the Order, and handlers subject to orders issued, or which may hereafter be issued, by the Secretary of Agriculture, will be encouraged to violate the provisions thereof, all of which will tend to thwart the national policy of improving marketing conditions with respect to the handling of lemons and other specified commodities in interstate and foreign commerce. The violations of the provisions of the Order committed by the defend-

ants, and each of them, caused, and continued violations will cause, great and irreparable damage to the plaintiff and to the public, and the plaintiff is without an adequate remedy at law in the premises.

XXV.

There are attached hereto and made a part hereof, the following exhibits, each of which is a true and correct copy.

“Exhibit A”: “Order Regulating the Handling of Lemons Grown in the States of California and Arizona.” (Order Series—Order No. 53).

“Exhibit B”: General regulations made by the Secretary of Agriculture with approval of the President under the Agricultural Adjustment Act of May 12, 1933, as amended (General Regulations—Series A, No. 1).

XXVI.

Notice of application for temporary restraining order cannot be given to the defendant without immediate and irreparable loss and [13] damage to the plaintiff and to the public.

Wherefore, Plaintiff Prays:

(1) That pending the final determination of this cause, the court issue a preliminary injunction preventing and restraining the defendant corporations, and each of them, their agents, officers, attorneys, employees, and assigns, and all persons acting under or in behalf of said defendant corporations, or any of them, or claiming so to act,

from the handling of lemons in violation of the provisions of said Order;

(2) That thereafter, on final hearing of this cause, said preliminary injunction be made permanent;

(3) That forthwith, upon the filing of Complaint, the court issue an order to show cause why a preliminary injunction pending the final determination of this cause should not be granted, and that concurrently with the issuance of said Order to Show Cause why a preliminary injunction should not issue, the court issue a temporary restraining order preventing and enjoining the said defendant corporations, and each of them, in like manner and effect as hereinbefore prayed, pending the return of said order to show cause and until further order of the court thereon;

(4) That the plaintiff be given all such other further and different relief as to this court may seem just and proper;

(5) That plaintiff recover its costs and disbursements.

WM. FLEET PALMER,
United States Attorney.

WILLIAM F. HALL,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[14]

(Duly verified.) [15]

[Title of Court and Cause in the La Verne Case.]

TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE

Upon reading the verified complaint on file herein, and it appearing therefrom and from the proceedings had herein that;

Under and pursuant to the terms and provisions of Public No. 10, 73d Congress, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 et seq.) the Secretary of Agriculture of the United States, after hearings held upon due notice, under and by virtue of the terms of said Act and the rules and regulations appertaining to such matters, issued an Order under the terms and provisions of Section 8c of said Act, which Order is entitled "Order Regulating the Handling of Lemons Grown in the States of California and Arizona"; and

It Further Appearing that by the terms of said Order the same became effective April 10, 1941, from and after the hour of 12:01 o'clock a.m., p.s.t., of said day, and has ever since said date and is now in full force and effect and operation; and

It Further Appearing that said defendant corporations are and each of them is engaged in the business of handling and shipping lemons grown in the State of California in violation of the terms of said Order, and each of said defendant corporations threatens to continue to engage in the han-

dling and shipping of such lemons without regard to and in violation of the terms of said Act, and the said Order; and

It Further Appearing that immediate and irreparable loss and damage will result to the plaintiff herein before the matter can be heard on notice;

Now, Therefore, it is hereby ordered that until the further order of this court, the defendant corporations, and all their servants, [18] agents, officers, attorneys, employees, and assigns, and each of them, and all persons acting on behalf of said defendants or claiming to act on behalf thereof, are hereby restrained and enjoined from handling or shipping in interstate commerce or to any point in Canada, lemons grown in the State of California or in the State of Arizona in violation of or contrary to the terms and provisions of the said "Order Regulating the Handling of Lemons Grown in the States of California and Arizona".

And It Is Further Ordered that the defendant corporations, and each of them, be and appear before this court at the United States Court House and Post Office Building in Los Angeles, California, on, to-wit, the 23d day of June, 1941, at the hour of 10 o'clock a.m. before the Honorable J. F. T. O'Connor, a Judge thereof, or as soon thereafter as counsel may be heard, and then and there show cause, if any they have, why, pending the final determination of the cause, an injunction should not be made herein enjoining and restraining the said defendants, and each of them, their servants, agents,

officers, attorneys, employees, and assigns, and each of them, and all persons acting on behalf of said defendants or claiming to act on behalf thereof, from handling or shipping lemons grown in the State of California or the State of Arizona in violation of or contrary to the terms of said "Order Regulating the Handling of Lemons Grown in the States of California and Arizona".

Dated: Los Angeles, California, this 17 day of June 1941.

J. F. T. O'CONNOR

United States District Judge.

[Endorsed]: With Stamp a True Copy, Attest,
Etc.

R. S. ZIMMERMAN,

Clerk U. S. District Court,

Southern District of California.

By FRANCIS E. CROSS

Deputy. [19]

The foregoing Temporary Restraining Order and Order to Show Cause was duly and regularly served upon defendant La Verne Co-Operative Citrus Association, a corporation, upon the 18th day of June, 1941; upon the defendant Glendora Co-Operative Citrus Association, a corporation, upon the 18th day of June, 1941, and upon the defendant Upland Orchards, Inc., a corporation upon the 18th day of June, 1941, all of said services having been made within the Southern District of California as ap-

pears by the return of the United States Marshal for said District, on file herein.

Within the time allowed by law and the stipulation of the parties, defendant LaVerne Co-Operative Citrus Association, a corporation, served and filed its verified answer, which was and is in the words and figures following, to-wit:

[Title of Court and Cause in the LaVerne Case.]

ANSWER OF DEFENDANT LA VERNE
CO-OPERATIVE CITRUS ASSOCIATION.

Answering the complaint herein, defendant LaVerne Co-Operative Citrus Association, hereinafter referred to as defendant, admits, denies and avers:

I.

Admits the allegations of Paragraph I.

II.

Admits the allegations of Paragraph II, and avers that defendant is a cooperative marketing corporation.

III.

Admits the allegations of Paragraph III and avers that Glendora Co-Operative Citrus Association is a cooperative marketing corporation.

IV.

Admits the allegations of Paragraph IV and avers that Upland Orchards, Inc., is a cooperative marketing corporation. [20]

V.

Admits the allegations of Paragraph V.

VI.

Admits the allegations of Paragraph VI.

VII.

Admits the allegations of Paragraph VII, except the allegation that "All interested persons, including defendant, were afforded a full opportunity to be heard concerning the proposed Order." And in this behalf avers that defendant was not given a full opportunity to be heard, in that it was not permitted to cross-examine witnesses for proponents of the proposed Order, or adverse witnesses, or to prove, or endeavor to prove, by way of cross examination, that the testimony and evidence introduced by proponents was false or fallacious and did not in fact prove what it purported to prove.

VIII.

Answering the allegations of Paragraph VIII, admits that the Secretary, purporting to act pursuant to and by virtue of authority vested in him by Section 8c of the Act, issued the Order on April 5, 1941. Admits that such Order by its terms became effective on April 10, 1941. Denies each and all of the other allegations of Paragraph VIII.

IX.

Admits the allegations of Paragraph IX, except the allegation that the parties signatory to the Mar-

keting Agreement, were handlers who handled more than eighty per cent (80%) of the volume of lemons covered by the Order. In this behalf defendant has no information or belief sufficient to enable it to *anser* said allegation, and on that ground denies the same.

X.

Admits that subsequent to the effective date of the Order and prior to April 23, 1941, the Secretary established a Lemon Administrative Committee and selected the members. Defendant has no [21] information or belief sufficient to enable it to answer the other allegations of Paragraph X and therefore and on that ground denies each and all thereof.

XI.

Answering the allegations of Paragraph XI of the complaint, admits that defendants Glendora Co-Operative Citrus Association, LaVerne Cooperative Citrus Association and Upland Orchards, Inc., are, and each of them is, handlers of lemons, engaged in the handling of lemons as the terms are defined in the Order. Admits that LaVerne Co-Operative Citrus Association, on or about May 2, 1941, made and filed with the said Committee a written application for a pro rate base and for allotments. But avers that all applications, and other documents and papers filed by defendant with the Committee, were filed under protest and without waiving any rights of the defendant. Defendant has no informa-

tion or belief sufficient to enable it to answer the remaining allegations in Paragraph XI of the complaint and therefore and upon that ground, denies each and all thereof.

XII.

Admits the allegations of Paragraph XII, except that defendant denies that the Secretary fixed and determined pro rate bases in accordance with the provisions of Section 953.4 of the Order.

XIII.

Admits the allegations of Paragraph XIII and avers that the week as fixed by the Secretary began at 12.01 A.M. on June 1, 1941 and ended 12.01 A.M. on June 8, 1941.

XIV.

Denies each and all of the allegations in Paragraph XIV, except that it admits that "For the said weekly regulation period, beginning June 1, 1941, and ending June 8, 1941, the Secretary fixed an allotment for the defendant LaVerne Co-Operative Citrus Association at three thousand five hundred fifty-seven (3,557) [22] packed boxes of lemons.

XV.

Denies each and all of the allegations of Paragraph XV.

XVI.

Answering the allegations of Paragraph XVI,

avers that during said weekly period beginning June 1, 1941 and ending June 8, 1941, defendant shipped and handled six thousand eight hundred forty-six (6,846) packed boxes of lemons as follows:

Date	From	To	Boxes:
June 1	La Verne, California	Waverly, N. J.	96
June 1	" "	Nevada (by truck)	25
June 1	" "	N. Hawthorne, N. J.	208
June 2	" "	Seranton, Pa.	406
June 2	" "	Richmond, Va.	320
June 3	" "	St. Louis, Mo.	208
June 3	" "	Baltimore, Md.	406
June 3	" "	Dallas, Texas	406
June 3	" "	Springfield, Mo. (truck)	150
June 4	" "	Cleveland, Ohio	406
June 4	" "	El Paso, Texas	406
June 4	" "	N. Hawthorne, N. J.	208
June 4	" "	Waverly, N. J.	96
June 5	" "	Denver, Colo.	406
June 5	" "	Harlem River, N. J.	406
June 5	" "	Seranton, Pa.	406
June 6	" "	St. Louis, Mo.	208
June 6	" "	Louisville, Ky.	330
June 6	" "	Jersey City, N. J.	406
June 6	" "	Milwaukee, Wis.	406
June 6	" "	Springfield, Mo. (truck)	125
June 7	" "	El Paso, Texas	406
June 7	" "	Philadelphia, Pa.	406

[23]

Except as specifically averred herein, defendant denies each and all of the allegations of Paragraph XVI.

XVII.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph

XVII, and therefore and on that ground denies each and all thereof.

XVIII.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XVIII, and therefore and on that ground denies each and all thereof.

XIX.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XIX and therefore and on that ground denies each and all thereof.

XX.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XX and therefore and on that ground denies each and all thereof.

XXI.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XXI and therefore and on that ground denies each and all thereof.

XXII.

Defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph XXII and therefore and on that ground denies each and all thereof.

XXIII.

Answering the allegations of Paragraph XXIII, admits that the market for lemons grown in the

states of California and Arizona is predominantly interstate in character. Admits that there is active competition for this interstate market among some handlers of lemons in the states of California and Arizona, but denies that there is [24] such competition between all such handlers. Admits that defendant is engaged in handling, selling and shipping lemons directly in interstate commerce. Denies that the absence of regulation of marketing would or will adversely affect the movement of lemons in interstate or foreign commerce, or would or will cause excessive or untimely moving of such fruit to market in the United States or Canada, or would or will subject the jobbing trade to increased risk through an unstabilized market for such fruits, or otherwise, or would or will cause an unstabilized market, or would or will cause loss of confidence in the market on the part of all persons, or any person, engaged in the handling of such lemons. Denies that the conditions referred to in Paragraph XIII have in any instance meant, or resulted in, a return to growers insufficient to meet the cost of producing and marketing their fruit, or have caused obstructions to the normal flow of distribution of such fruit among the several states or with Canada. Admits that one result of the disorderly marketing of lemons is to lower the standard of trade in lemons in interstate commerce and in commerce with Canada to the detriment of both growers and distributors of such fruit, but denies that there was, or has been, any disorderly marketing of lemons, except such as

has been occasioned by the operation of the Order referred to in Paragraph V of the complaint. In this behalf avers that said Order and the operation thereof have resulted in unstabilized marketing conditions and in disorderly marketing. Admits that from time to time there have been serious fluctuations in the price at which such fruit may be sold by handlers and in the price paid to growers thereof, but avers that such fluctuations have not been brought about or aggravated by the absence of the regulation of marketing. On the contrary avers that such fluctuations have been occasioned and aggravated by the operation of said Order.

XXIV.

Answering the allegations of Paragraph XXIV admits that [25] defendants herein conduct their businesses in active and substantial competition with other handlers of lemons. Defendant has no information or belief sufficient to enable it to answer the allegation that other handlers are complying, or have complied, with the provisions of the Order, and on that ground, denies the same. Admits that at times, until served with the temporary restraining order, defendant herein failed and refused to comply with those terms of the Order fixing the weekly allotments and limiting their shipments in interstate commerce. Admits that the plan of regulation contained in the Order contemplates the pro-ration and allotment of lemons from week to week under conditions specified in the Order. Denies each and all of the other allegations of Paragraph XXIV.

XXV.

Admits the allegations of Paragraph XXV.

XXVI.

Denies each and all of the allegations of Paragraph XXVI.

For a Separate and Further Defense, Defendant Avers:

I.

The commercial production of lemons in the United States is confined almost entirely to the State of California. There is a comparatively small production in the State of Arizona; as defendant is informed and believes and therefore and on that ground avers, less than 500 acres being planted to lemons in that state. In California there are over 6,000 lemon growers growing lemons on more than 69,000 acres. The average annual on tree farm value of California lemons for the five years ending with the 1939-40 marketing season amounted to more than \$15,000,000. The marketing season begins on November 1 of one year and ends on October 31 of the following year.

The shipment of lemons from California is primarily interstate in character. From 75% to 80% of California lemons are sold and shipped for commercial fresh fruit consumption. Of this fruit [26] approximately 90% is shipped to markets outside of California. Lemons are shipped throughout the United States and in addition to Canada and other foreign countries. Practically the entire supply of

lemons consumed in the United States is grown in and shipped from California; less than 1% from Arizona.

Lemons are picked and shipped in every month of the year. For California-Arizona as a whole the heaviest picks generally occur in the months of February, March, April and May. Shipments are generally heaviest in the months of June, July and August.

II.

Lemons are a tree crop which require from four to six years to bring to production. Although the trees produce the year round, there are definite peaks of productivity. The fruit is usually picked when it attains merchantable size, this being determined by the use of a ring of size depending upon the picking policy of the particular producer involved, market conditions at the time and the condition of the fruit. When lemons are picked they are placed in picking (or field) boxes and hauled to a packing house or other shipping point. When they arrive at the packing house they are washed and sorted for color. Very low grade lemons, which are called "washer culls", are then removed.

Lemons not suitable for sale in fresh form having been eliminated, the remainder are generally, but not always, placed in storage, usually in basements which are air-conditioned, and are there held until they are to be prepared for market. When that time comes they are removed from the storage rooms and placed upon grading belts, where they are graded by

hand and sized largely by eye, after which they are packed in standard packing boxes for shipment, or are occasionally sold loose within the state. An elimination again takes place during this final operation, when unmerchable fruit, or fruit which the handler does not wish to market, is set aside for by-products disposition. [27]

III.

Peak picks of lemons are generally later in the season in the coastal areas of California than in the interior. The coastal areas are mostly in Ventura and Santa Barbara Counties, where recently increased plantings generally exceed those in other parts of the state. Lemons are classified with reference to maturity and color, as dark green, light green, silver, and tree-ripte (or yellow). The interior sections of California have large picks of tree-ripes coming mostly at one time, and most of the crop is of that type, whereas the coastal areas do not have such heavy picks at any one time and they are more uniformly of a dark green color. Green lemons keep in storage longer than silvers, and silvers longer than tree-ripes. Tree-ripes will keep in storage from ten days to six weeks; dark greens as long as six months. This difference in storage life is due not only to color at the time of picking, but also to the uniform growth rate the fruit has had during the growing season.

In the coastal areas there is less variation in the climatic condition, and the fruit has a more uniform

growth period than it does in the interior districts, which in the winter months are subject to greater cold and in the summer time to a higher temperature and a more arid atmosphere.

There is a marked difference in the proportion of tree-ripes in different groves in the same district; the age of the trees, their physical condition and soil condition being controlling factors. The proportion of tree-ripes in the same orchard (particularly orchards in the interior sections) varies markedly from year to year, due to climatic conditions, such as wind and variation in humidity and temperature. A dry wind will bring lemons to yellow or tree-ripe color before their time and has a tendency to shorten their life expectancy. [28]

IV.

Lemons are stored in loose boxes. They are shipped in packed boxes of standard size, the number of lemons in a packed box varying according to their size. They are known and referred to in the trade as to size by the number which can be packed in a standard packed box as 300's, 360's, etc.

When lemons are being packed for shipment they are removed from the loose boxes and placed upon grading belts, and when a handler is packing he packs all available lemons which are on the belts. He does not take some and let the others go back into loose boxes. Rehandling of lemons tends to injure the fruit, reduce its merchantability and increase the cost of handling. In the process of packing, lemons are segregated as to size and grade, and

when a sufficient number of various sizes and grades are packed they are placed in cars for shipment. Lemons are only shipped in less than carload lots when shipped with other citrus fruits. It is not practicable nor economical to pack only one carload at a time. Unless a handler is permitted to pack at least two, and usually three, carloads at a time, he cannot compete successfully and will be forced out of business.

V.

Lemons shipped in interstate commerce are sold either at private sale F.O.B. packing house, or on a price arrival basis, or at auction. There are ten auction markets outside of, and one in, California. California Fruit Growers Exchange handles approximately 90% of the total lemon production of the United States. It sells most of the lemons marketed by it through the auctions. California Fruit Growers Exchange (hereinafter for convenience sometimes called "the Exchange") is a so-called cooperative marketing corporation marketing for more than 4,000 lemon growers. These growers turn in their fruit to various packing houses, of which they are members and which prepare it for shipment and ship it. Defendant is informed and [29] believes and therefore alleges, that over 60 packing houses handling lemons are affiliated with the Exchange. These houses are grouped into 25 district exchanges. The Exchange is made up of these district exchanges, with one director from each on the central board. Each district exchange, in turn, is made up of a group of local associations

or packing houses, with one director from each local association elected by its board; the directors of each local association are elected by its grower members. The local association or packing houses affiliated with the Exchange include both commercial corporations for profit and cooperative corporations.

VI.

Defendant is a cooperative marketing corporation, having its principal place of business at La Verne, Los Angeles County, California. For more than ten years last past it has been engaged in the business of selling (through a central marketing organization) and shipping lemons in interstate commerce. Defendant handles lemons for approximately 119 growers who have a producing acreage of approximately 683 acres in California.

VII.

Defendant markets its lemons through Mutual Orange Distributors, which is a cooperative marketing corporation organized under the laws of California. Mutual Orange Distributors (hereinafter for convenience sometimes referred to as "M. O. D.") has been marketing lemons and other citrus fruit for its member associations for many years and is a handler of lemons for nine cooperative corporations including defendant. M.O.D. markets for about 700 lemon growers in California, who own about 5,000 acres of producing lemon orchards. Its shipments average about 1,000 cars a year, divided among the various associations affiliated with it.

Approximately 75% of the lemons handled by M.O.D. and its member houses, including defendant, is sold and shipped for consumption in states other than California and Arizona. It has agents in [30] every carload market in the United States and Canada. While it has some salaried agents, it operates chiefly through brokers. Sales are negotiated by these agents and brokers, contracts of purchase and sale being signed in the state of delivery, and shipments made from California. M.O.D. sells for its member houses, including defendants, and they ship about 50% of the lemons handled by it and them direct to one consumer with its own retail outlets, which plans its orders for normal requirements weeks, and sometimes months, in advance.

M.O.D. and this defendant over a period of years have developed outlets for lemons to buyers who have long done and who want to continue to do business with M.O.D. and defendant. Shipments move to market in accordance with the demand of such buyers.

In order to supply the demand of its customers, defendant must know several weeks, and sometimes months, in advance what volume it is going to be able to supply. This type of operation is radically different from sales where, instead of selling direct to buyers with retail outlets, or other private sales on order, cars of lemons are moved to and sold at auction.

VIII.

The order referred to in Paragraph V of the complaint herein (hereinafter called "said Order" and sometimes "Order No. 53") creates an administrative committee consisting of six members appointed by the Secretary of Agriculture (hereinafter sometimes called "the Secretary") from persons nominated as provided in said Order. This committee is empowered by said Order to administer the provisions thereof and is charged with the duty of recommending to the Secretary the quantity of lemons to be handled each week in interstate commerce. Whenever the Secretary finds from the recommendations and information submitted by said committee, or from other available information, that to limit the quantity of lemons which may be handled in interstate commerce during a specified week will [31] tend to effectuate the declared policy of the Act, he fixes the quantity of lemons which may be handled during such week.

Said Order provides that each handler (that is, each first handler) of lemons shall submit to the committee a written application for a prorated base and for allotments; that the committee shall, with respect to each handler who has filed an application for a prorated base, compute the quantity of available lemons which, as of 12:01 A. M. on the Sunday nearest the date on which such computation is made, meets the requirements of marketing under applicable laws; that such computation shall be made every two weeks beginning with a date in

each fiscal year to be fixed by the committee and continuing so long as the committee recommends that regulation under said Order remain in effect.

Said Order further provides that the committee, in computing the quantity of lemons which for the applicable two week period each handler has available for current shipment, shall compute the quantity of lemons which each handler has picked from the trees and has assembled at an established shipping point within the area of production; that in the event any handler has lemons which he desires to market in other than fresh fruit channels, he may request the committee to compute the number of weeks that such lemons could be held in storage under commercial storage conditions, and, at the expiration of such period, would meet the requirements for marketing under applicable laws; that any such lemons shall be in containers and shall be assembled at one or more of the central points which may be approved by the committee; that if said handler is satisfied with the committee's computation, he shall give the committee written notification thereof and shall dispose of such lemons in other than fresh fruit channels; that the committee shall include such lemons as a part of the available lemons of such handler for the number of weeks computed.

Said Order further provides that if any handler submits [32] evidence satisfactory to the committee that such handler has lemons available for current shipment during the applicable two-week period,

but because of unavailable facilities the quantity of such lemons cannot be computed satisfactorily by the method otherwise provided by said Order, that said committee shall compute, pursuant to uniform rules adopted by the committee and approved by the Secretary, the quantity of lemons which such handler has available for current shipment during such period.

It is further provided in said Order that the quantity of each handler's lemons, as computed pursuant to the Order, shall be reported to the Secretary and shall constitute the recommendation of the committee as the quantity of lemons to be used by the Secretary in determining the prorate base, subject to adjustment by deduction of under-shipments and the addition of over-shipments, as authorized by said Order; that upon the basis of the recommendations and reports submitted by the committee, or other available information, the Secretary shall fix a prorate base for each handler who has made application therefor; that such prorate base shall represent the ratio between the quantity of each such handler's available lemons and the quantity of all such handlers' available lemons, and shall be applicable for the two-week period immediately following the week in which it is fixed by the Secretary; that whenever the Secretary has fixed the total quantity of lemons which may be handled during any week, and has fixed the handlers' prorate bases, the committee shall calculate the quantity of lemons which may be handled by

each such handler during such week; that such quantity shall be the allotment of each such handler, and shall be in an amount equal to the product of the handler's prorated base and the total quantity which may be handled during such week.

Respecting over-shipments, said Order provides that during any week for which the Secretary has fixed the quantity of lemons which may be handled, any handler (when not required to reduce the quantity [33] of lemons which he may handle) may handle, in addition to his allotment, an amount of lemons equivalent to 10% of said allotment, or one carload, whichever is greater, but that the quantity of lemons handled in excess of a handler's allotment (but not exceeding the quantity permitted to be handled) shall be deducted from his allotment for the next week in which the handling of lemons is regulated by said Order; that if such allotment is in an amount less than such quantity of lemons permitted to be handled by a handler, such quantity handled in excess of his allotment shall be deducted from succeeding weekly allotments until such excess has been entirely offset.

Respecting under-shipments, said Order provides that if a handler, during any week, handles a quantity of lemons less than his allotment for that week, such handler may, in addition to his allotment for the next succeeding week, handle only during such next succeeding week a quantity of lemons equivalent to such under-shipments.

Said Order provides that no handler shall han-

dle lemons except as provided by said Order and in conformity therewith.

IX.

Following the effective date of said Order, an administrative committee, as provided for therein, was appointed by the Secretary, which committee thereafter recommended to the Secretary volume regulation of shipments as provided in said Order. Thereupon the Secretary, pursuant to recommendations of said committee, fixed a total quantity of lemons which might be handled in the current of interstate commerce for the weekly period beginning 12:01 A. M. June 1, 1941 to 12:01 A. M. June 8, 1941, at 263,900 packed boxes, and the allotment of defendant at 3,557 packed boxes, computed on a pro-rate base of 1.348% of such total quantity.

Similarly, for the week beginning 12:01 A. M. June 8, 1941 to 12:01 A. M. June 15, 1941, the Secretary fixed a total quantity at [34] 233,450 packed boxes and the allotment of the defendant at 3147 packed boxes, computed on a prorate base of 1.348% of such total, which allotment was subsequently adjusted to 2741 packed boxes, by deducting 406 boxes for alleged over-shipment.

Similarly, for the week beginning 12:01 A. M. June 15, 1941 to 12:01 A. M. June 22, 1941, the Secretary fixed a total quantity at 223,300 packed boxes, and the allotment of defendant at 2282 packed boxes, computed on a prorate base of 1.022% of such total.

Similarly, for the week beginning 12:01 A. M.

June 22, 1941 to 12:01 A. M. June 29, 1941, the Secretary fixed a total quantity at 233,450 packed boxes, or 575 cars (on the basis of 406 packed boxes to the car), and the allotment of defendant at 2385 packed boxes, computed on a prorate base of 1.022% of such total. On June 24, 1941, on the recommendation of said committee, the Secretary increased the total quantity fixed for the week beginning June 22, 1941, from 575 cars to 700 cars, and the allotment of defendant to 2904 packed boxes, which was subsequently adjusted to 2498 packed boxes for an alleged over-shipment of 406 packed boxes.

Similarly, for the week beginning 12:01 A. M. June 29, 1941 to 12:01 July 6, 1941, the Secretary fixed a total quantity at 243,600 packed boxes, and the allotment of defendant at 2300 packed boxes, computed on a pro-rate base of .944% of such total. On July 2, 1941, on the recommendation of said committee, the Secretary increased the total quantity fixed for the week beginning June 29, 1941, from 600 cars to 700 cars, and the allotment of defendant to 2683 packed boxes, which was subsequently adjusted to 2692 packed boxes, by adding 16 for an alleged under-shipment and deducting 7 for borrowings paid back during the previous week.

Similarly, for the week beginning 12.01 July 6, 1941 to 12.01 July 13, 1941, the Secretary fixed the total quantity at 284,200 packed boxes and the allotment of defendant at 2683 packed boxes, on a prorate base of .944% of such total, which allot-

ment [35] was subsequently adjusted to 2428 packed boxes by deducting 255 boxes for alleged over-shipment.

Similarly, for the week beginning 12.01 A. M. July 13, 1941 to 12.01 July 20, 1941, the Secretary fixed the total quantity at 263,900 packed boxes and the allotment of the defendant at 2391 packed boxes, computed on a prorate base of .906% of such total, which allotment was subsequently adjusted to 2586 packed boxes because of an alleged under-shipment of 195 boxes in the previous week.

Similarly, for the week beginning 12.01 A. M. July 20, 1941 to 12.01 July 27, 1941, the Secretary fixed the total quantity at 233,450 packed boxes and the allotment of defendant at 2115 packed boxes, computed on a prorate base of .906% of such total, which allotment was subsequently reduced to 1728 packed boxes because of an alleged over-shipment of 387 packed boxes in the previous week.

Similarly, for the week beginning 12.01 A. M. July 27, 1941 to 12.01 August 3, 1941, the Secretary fixed the total quantity at 223,300 packed boxes and the allotment of defendant at 2300 packed boxes computed on a prorate base of 1.030% of such total. On July 29, 1941, on the recommendation of said committee, the Secretary increased the total quantity fixed for the week beginning July 27, 1941, at 550 cars to 700 cars, and the allotment of defendant to 2927 packed boxes, which was subsequently changed to 5367 packed boxes because of an alleged under-shipment of 4 boxes and loans of 2436 packed boxes.

Similarly, for the week beginning 12.01 A. M. August 3, 1941 to 12.01 August 10, 1941, the Secretary fixed the total quantity at 243,600 packed boxes and the allotment of defendant at 2509 packed boxes, computed on a prorate base of 1.030% of such total. On August 5, 1941, on the recommendation of said committee, the Secretary increased the total quantity fixed for the week [36] beginning August 3, 1941, from 600 cars to 700 cars, and the allotment of defendant to 2927 packed boxes, which was subsequently changed to 1709 packed boxes because of an alleged forfeit of 107 packed boxes and borrowings paid back of 1218 boxes.

Similarly, for the week beginning 12.01 A. M. August 10, 1941 to 12.01 A. M. August 17, 1941 the Secretary fixed the total quantity at 284,200 packed boxes, and the allotment of defendant at 3180 packed boxes, computed on a prorate base of 1.119% of such total, which allotment was subsequently adjusted to 1734 packed boxes because of an alleged over-shipment of 228 boxes and borrowings paid back of 1218 boxes.

Similarly, for the week beginning 12.01 A. M. August 17, 1941 to 12.01 A. M. August 24, 1941 the Secretary fixed the total quantity at 162,400 packed boxes, and the allotment of defendant at 1817 packed boxes, computed on a prorate base of 1.119% of such total, which was subsequently adjusted to 1411 packed boxes by adding 812 boxes for under-shipment and deducting 1218 boxes for borrowings paid back.

Similarly, the Secretary has fixed total quantities and the allotments of defendant for each week subsequent to the week ending at 12.01 A. M. August 24, 1941, in varying amounts, for which certificates of allotments and certificates of adjusted allotments have been issued by said committee.

X.

Since June 18, 1941 defendant has received a large number of orders, including orders from regular customers which it could and would have filled in the ordinary course of business, but which it was prevented from filling by reason of Order No. 53 and the operation thereof by said committee and the Secretary.

Defendant has also been prevented from selling large quantities of lemons at prices which would return profit to its growers, by reason of said order and the operation thereof by said committee [37] and the Secretary, in addition to orders received which it was unable to fill. Defendant is informed and believes and on that ground avers, that such orders and quantities as it has been so prevented from filling, selling and shipping, were filled, sold and shipped by the Exchange.

Defendant is informed and believes and therefore and on that ground alleges, that it will be prevented, so long as said Order remains in effect and so long as the same continues to be operated by said committee and by the Secretary on the recommendation of said committee, from filling a large number of orders received from its customers, and in addi-

tion thereto, from selling lemons for which there is a demand, and which could be sold by it at prices returning profit to its growers; that by reason of said Order and the operation thereof, defendant is losing, and will continue to lose, customers who, as defendant is informed and believes and therefore and on that ground alleges, will become customers of its principal competitor, the Exchange; all to its irreparable loss and damage.

XI.

There is no profitable outlet for the sale of approximately 90% of the lemons produced in California, including lemons handled by defendant, except in interstate commerce. To accommodate its interstate business, facilities have been developed for the packing and shipment of lemons, including the packing houses, storage and other facilities of defendant, in which large sums of money have been invested. Defendant's storage facilities are inadequate for operation under Order No. 53. In order to operate competitively under said Order, it is necessary for defendant to provide additional storage, at a cost of many thousands of dollars, which would otherwise be unnecessary. By reason of said order, defendant has been, is being, [38] and will continue to be, put to large expense in the rehandling of lemons, which would otherwise be unnecessary.

XII.

Said Order as applied and administered by said

committee, and by the Secretary on the recommendations of said committee, is unreasonable, arbitrary, unjust and discriminatory as against defendant, in that total weekly shipments have been fixed in unreasonably low amounts and amounts much less than the market would absorb at prices which would provide reasonable and profitable returns to the growers whose lemons are handled by defendant.

Defendant handles green, silver and tree-ripe (yellow) lemons for its producer principals. Because of the short storage life of tree-ripe and silver lemons, it is necessary to ship them in a very much shorter period after they are picked than is the case with green lemons; otherwise such tree-ripes and silvers will decay and become unfit for disposal in fresh fruit trade channels. Because of the unreasonably low shipments permitted by **said committee**, and the Secretary, and the unreasonably low and discriminatory allotments allowed defendants, it has been compelled to send a large quantity of lemons to by-products and otherwise dispose thereof in other than fresh fruit channels, and it will be unable to market quantities of tree-ripes and silvers in fresh fruit form, and will not be given the benefit thereof in the computation of its allotments, except during their brief storage life; by reason whereof defendant has suffered, and is now suffering, and will continue to suffer great and irreparable loss and damage; its costs of operation have been, are being, and will

be unnecessarily and unreasonably increased by the operation of said order; it has been and is being deprived of its customers and trade outlets; all to defendant's great injury and damage and the unjust enrichment of the Exchange.

XIII.

By reason of the premises said Order and the orders of the [39] Secretary implementing said Order are, and each thereof is, unjust, unreasonable, arbitrary and discriminatory as to this defendant, and said Order and the Orders of the Secretary implementing said Order, each and all, constitute an unwarranted and unlawful exercise of the police power, and are violative of the Fifth Amendment to the Constitution of the United States, in that they deprive defendant of its property without due process of law.

Wherefore, defendant prays that plaintiff take nothing by its action, and that this defendant be dismissed hence with its costs.

GUY RICHARDS CRUMP,

EMMET H. WILSON, JR.,

By GUY RICHARDS CRUMP,

Attorneys for Defendant.

Answer duly verified by C. I. Cartwright, Secretary-Treasurer of La Verne Cooperative Citrus Association, on the 24th day of October, 1941, before Hertha N. Ebert, Notary Public.

[Endorsed]: Filed October 31, 1941. [40]

Within the time allowed by law and the stipulation of the parties, defendant Glendora Co-Operative Citrus Association, a corporation, served and filed its verified answer, which was and is in the words and figures following, to-wit:

[Title of the Court and Cause in the LaVerne Case.]

ANSWER OF DEFENDANT GLENDORA CO-
OPERATIVE CITRUS ASSOCIATION.

Answering the complaint herein defendant Glendora Co-Operative Citrus Association (hereinafter referred to as "defendant") admits, denies and avers:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II and avers that LaVerne Co-Operative Citrus Association is a co-operative marketing corporation.

III.

Admits the allegations of paragraph III and avers that defendant is a co-operative marketing corporation.

IV. to X.

Paragraphs IV. to X., both inclusive, in this answer are the same as the correspondingly numbered paragraphs IV. to X., both inclusive, in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in the La Verne Case.

XI.

Answering the allegations of paragraph XI of the complaint, admits that defendants Glendora Co-Operative Citrus Association, LaVerne Co-Operative Citrus Association and Upland Orchards, Inc., [41] are, and each of them is, handlers of lemons, engaged in the handling of lemons as the terms are defined in the Order. Admits that Glendora Co-Operative Citrus Association on or about May 7, 1941, made and filed with the said Committee a written application for a prorated base and for allotments. But avers that all applications and other documents and papers filed by defendant with the Committee were filed under protest and without waiving any rights of the defendant. Defendant has no information or belief sufficient to enable it to answer the remaining allegations of paragraph XI of the complaint and therefore and on that ground denies each and all thereof.

XII. and XIII.

Paragraphs XII and XIII, both inclusive, in this answer are the same as the correspondingly numbered paragraphs XII and XIII, both inclusive, in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in the La Verne Case.

XIV.

Defendant has no information or belief sufficient to enable it to answer the allegations of paragraph XIV, and therefore and on that ground denies each and all thereof.

XV.

Paragraph XV. in this answer is the same as the correspondingly numbered paragraph XV. in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in the La Verne Case.

XVI.

Defendant has no information or belief sufficient to enable it to answer the allegations of paragraph XVI. and therefore and on that ground denies each and all thereof.

XVII.

Denies each and all of the allegations of paragraph XVII, except that it admits that "For the said weekly regulation period [42] beginning June 1, 1941, and ending June 8, 1941, the Secretary fixed an allotment for defendant Glendora Co-Operative Citrus Association at two hundred eighty-eight (288) packed boxes of lemons".

XVIII.

Denies each and all of the allegations of paragraph XVIII.

XIX.

Answering the allegations of paragraph XIX, avers that during said weekly period beginning June 1, 1941, and ending June 8, 1941, defendant shipped and handled eight hundred eighty-five (885) packed boxes of lemons, as follows:

Date	From	To	Boxes
June 2	Glendora, Calif.	Cleveland, Ohio	406
2	Azusa Ave., Calif.	Hickory, N. C.	96
3	Glendora, Calif.	Dallas, Texas (truck)	21
3	Glendora, Calif.	Dallas, Texas (truck)	114
6	Glendora, Calif.	Kansas City, Mo.	144
6	Glendora, Calif.	Waverly, N. J.	104

Except as specifically averred herein, defendant denies each and all of the allegations of paragraph XIX.

XX. to XXVI.

Paragraphs XX. to XXVI, both inclusive, in this answer are the same as the correspondingly numbered paragraphs XX to XXVI, both inclusive, in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in the La Verne Case.

For a Separate and Further Defense Defendant Avers:

I. to V.

Paragraphs I. to V., both inclusive of the Separate and Further Defense in this answer are the same as the correspondingly numbered paragraphs I. to V., both inclusive, in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in its separate and further defense in the La Verne Case. [43]

VI.

Defendant is a co-operative marketing corporation having its principal place of business at Glendora, California. For more than ten years last past it has been engaged in the business of selling (through a

central marketing organization) and shipping lemons in interstate commerce. Defendant handles lemons for approximately 35 growers, who have a producing acreage of approximately 183 acres in California.

VII.

Paragraph VII. of the Separate and Further Defense in this answer is the same as the correspondingly numbered paragraph VII. in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in its separate and further defense in the La Verne Case.

VIII.

Paragraph VIII. of the Separate and Further Defense in this answer is the same as the correspondingly numbered paragraph VIII. in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in its separate and further defense in the La Verne Case.

IX.

Following the effective date of said Order, an administrative committee, as provided for therein, was appointed by the Secretary, which committee thereafter recommended to the Secretary volume regulation of shipments, as provided in said Order. Thereupon the Secretary, pursuant to recommendations of said committee, fixed the total quantity of lemons which might be handled in the current of interstate commerce for the weekly period beginning 12:01 A.M., June 1, 1941, to 12:01 A.M., June 8, 1941, at

263,900 packed boxes, and the allotment of defendant at 288 packed boxes, computed on a prorate base of .109% of such total quantity.

Similarly for the week beginning 12:01 A.M., June 8, 1941, [44] to 12:01 A.M., June 15, 1941, the Secretary fixed the total quantity at 233,450 packed boxes, and the allotment of defendant at 255 packed boxes, computed on a prorate base of .109% of such total, which allotment was subsequently adjusted to minus 151 packed boxes for alleged over-shipment.

Similarly for the week beginning 12:01 A.M., June 15, 1941, to 12:01 A.M., June 22, 1941, the Secretary fixed the total quantity at 223,300 packed boxes, and the allotment of defendant at 217 packed boxes, computed on a prorate base of .097% of such total, which allotment was subsequently adjusted to 66 packed boxes by deducting 151 packed boxes for alleged over-shipment.

Similarly for the week beginning 12:01 A.M., June 22, 1941, to 12:01 A.M., June 29, 1941, the Secretary fixed the total quantity at 233,450 packed boxes, or 575 cars (on the basis of 406 packed boxes to the car), and the allotment of defendant at 227 packed boxes, computed on a prorate base of .097% of such total. On June 24, 1941, on the recommendation of said committee, the Secretary increased the total quantity fixed for the week beginning June 22, 1941, from 575 cars to 700 cars, and the allotment of defendant to 276 packed boxes, which was subsequently adjusted to minus 130 boxes for alleged over-shipments of 406 boxes.

Similarly for the week beginning 12:01 A.M., June 29, 1941, to 12:01 A.M., July 6, 1941, the Secretary fixed the total quantity at 243,600 packed boxes, and the allotment of defendant at 171 packed boxes, computed on a prorated base of .070% of such total. On July 2, 1941, on the recommendation of said committee, the Secretary increased the total quantity fixed for the week beginning June 29, 1941, from 600 to 700 cars, and the allotment of defendant to 200 packed boxes, which was subsequently adjusted to 70 packed boxes by deducting 130 packed boxes for alleged over-shipments.

Similarly for the week beginning 12:01 A.M., July 6, [45] 1941, to 12:01 A.M., July 13, 1941, the Secretary fixed the total quantity at 284,200 packed boxes, and the allotment of defendant at 200 packed boxes, computed on a prorated base of .070% of such total, which was subsequently adjusted to 270 packed boxes, based upon an alleged under-shipment of 70 packed boxes.

Similarly for the week beginning 12:01 A.M., July 13, 1941, to 12:01 A.M., July 20, 1941, the Secretary fixed the total quantity at 263,900 packed boxes, and the allotment of defendant at 142 packed boxes, computed on a prorated base of .054% of such total, which allotment was subsequently changed by adding 34 packed boxes for an alleged under-shipment, and deducting 34 packed boxes for an alleged forfeit, leaving the amount of the allotment at 142 packed boxes.

Similarly for the week beginning 12:01 A.M., July 20, 1941, to 12:01 A.M., July 27, 1941, the Sec-

retary fixed the total quantity at 233,450 packed boxes, and the allotment of defendant at 126 packed boxes, on a prorate base computed at .054% of such total, which allotment was subsequently adjusted to 201 packed boxes because of an alleged under-shipment of 75 packed boxes.

Similarly for the week beginning 12:01 A.M., July 27, 1941, to 12:01 A.M., August 3, 1941, the Secretary fixed the total quantity at 223,300 packed boxes, and the allotment of defendant at 110 packed boxes, computed on a prorate base of .049% of such total. On July 29, 1941, on the recommendation of said committee, the Secretary increased the total quantity fixed for the week beginning July 27, 1941, from 550 to 700 cars, and the allotment of defendant to 140 packed boxes, which was subsequently changed to 266 packed boxes because of an alleged under-shipment of 201 packed boxes and an alleged forfeit of 75 boxes.

Similarly for the week beginning 12:01 A.M., August 3, 1941, to 12:01 A.M., August 10, 1941, the Secretary fixed the [46] total quantity at 243,600 packed boxes, and the allotment of defendant at 119 packed boxes, on a prorate base of .049% of such total. On August 5, 1941, on the recommendation of said committee, the Secretary increased the total quantity for the week beginning August 3, 1941, from 600 to 700 cars, and the allotment of defendant to 139 packed boxes, which was subsequently adjusted to 114 packed boxes because of an alleged over-shipment of 25 packed boxes.

Similarly for the week beginning 12:01 A.M.,

August 10, 1941, to 12:01 A.M., August 17, 1941, the Secretary fixed the total quantity at 284,200 packed boxes, and the allotment of defendant at 128 packed boxes, computed on a prorate base of .045% of such total, which allotment was subsequently adjusted to 138 packed boxes because of an alleged under-shipment of 10 boxes.

Similarly for the week beginning 12:01 A.M., August 17, 1941, to 12:01 A.M., August 24, 1941, the Secretary fixed the total quantity at 162,400 packed boxes, and the allotment of defendant at 73 packed boxes, on a prorate base of .045% of such total, which was subsequently adjusted to 97 packed boxes because of an alleged under-shipment of 34 boxes, less an alleged forfeit of 10 boxes.

Similarly the Secretary has fixed total quantities and the allotments of defendant for each week subsequent to the week ending at 12.01 A.M., August 24, 1941, in varying amounts, for which certificates of allotment and certificates of adjusted allotments have been issued by said committee.

X.

Since June 18, 1941, defendant has been prevented by said Order and the operation thereof from filling numerous orders, including orders from regular customers of Mutual Orange Distributors which it could otherwise have filled in the ordinary course of business. Defendant has also been prevented from selling large [47] quantities of lemons at prices which would return profit to its growers, by reason of said Order and the operation thereof

by said committee and the Secretary, in addition to orders which it was unable to fill. Defendant is informed and believes and on that ground avers that such orders and quantities as it has been so prevented from filling, selling and shipping, were filled, sold and shipped by the Exchange.

The remaining portion of this Paragraph X. in this answer is the same as the last said paragraph in paragraph X. in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in its separate and further defense in the La Verne Case.

XI.

Paragraph XI. of the Separate and Further Defense in this answer is the same as the correspondingly numbered paragraph XI. in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in its separate and further defense in the La Verne Case.

XII.

Said Order as applied and administered by said committee, and by the Secretary on the recommendation of said committee, is arbitrary, unreasonable, unjust and discriminatory as against defendant, in that, as defendant is informed and believes and on that ground avers, competitors of defendant have been given excessive advance credits for lemons marketed in other than fresh fruit channels, advance credits for unmerchantable lemons, and excessive prorated bases, with the result that such com-

petitors have received larger allotments than they are entitled to under said Order, and that defendant has received correspondingly smaller allotments than it is entitled to; also because certain handlers have been, and are being, permitted to ship without being required to limit their shipments. [48]

XIII.

Said Order as applied and administered by said committee, and by the Secretary on the recommendations of said committee, is unreasonable, arbitrary, unjust and discriminatory as against defendant, in that total weekly shipments have been fixed in unreasonably low amounts and amounts much less than the market would absorb at prices which would provide reasonable and profitable returns to the growers whose lemons are handled by defendant.

Defendant handles green, silver and tree-ripe (yellow) lemons for its producer principals. Because of the short storage life of tree-ripe and silver lemons, it is necessary to ship them in a very much shorter period after they are picked than is the case with green lemons; otherwise such tree-ripes and silvers will decay and become unfit for disposal in fresh fruit trade channels. Because of the unreasonably low shipments permitted by said committee, and the Secretary, and the unreasonably low and discriminatory allotments allowed defendant, it has been compelled to send a large quantity of lemons to by-products and otherwise dispose thereof in other than fresh fruit channels, and it will be un-

able to market quantities of tree-ripes and silvers in fresh fruit form, and will not be given the benefit thereof in the computation of its allotments, except during their brief storage life; by reason whereof defendant has suffered, is now suffering, and will continue to suffer great and irreparable loss and damage; its costs of operation have been, are being, and will be unnecessarily and unreasonably increased by the operation of said Order; it has been and is being deprived of its customers and trade outlets; all to the defendant's great injury and damage and the unjust enrichment of the Exchange.

XIV.

Paragraph XIV. of the Separate and Further Defense in this answer is the same as the paragraph numbered XIII. in the answer of [49] the defendant La Verne Co-Operative Citrus Association, a corporation, in its separate and further defense in the La Verne Case.

Prayer and signature of attorneys is the same as in the answer of the defendant La Verne Co-Operative Citrus Association, a corporation, in the La Verne Case.

Answer duly verified by O. W. Cave, Treasurer of Glendora Co-Operative Citrus Association, on the 31st day of October, 1941, before Hertha N. Ebert, Notary Public.

[Endorsed]: Filed October 31, 1941. [50]

[Title of District Court and Cause in the La Verne Case.]

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The above entitled cause having been consolidated for trial by order of the Court, and the restraining order heretofore granted against all the defendants together with the application of plaintiff for a preliminary injunction having been duly continued until the trial of said cause, and the trial of said cause and hearing upon said application having regularly come on for hearing and trial, and hearing and trial having been had on the 31st day of March, 1942, and the 2nd day of April, 1942, by the Court without a jury, upon the verified complaints, answers and stipulations filed therein, and upon affidavits filed in support of and in opposition to the applica- [51] tion for preliminary injunction, and the Court having heard argument of all counsel and being fully advised in the premises hereby makes the following findings of fact and conclusions of law in said cause:

FINDINGS OF FACT

I.

This action is brought by the United States of America against the defendants, La Verne Co-Operative Citrus Association, a California corporation, with its principal place of business at La Verne, Los Angeles County, California; the Glen-

dora Co-Operative Citrus Association, a California corporation, whose principal place of business is Glendora, California; and Upland Orchards, Inc., a California corporation with its principal place of business at Upland, California.

II.

The proceeding was brought under Section 8a (6) of the Act of May 12, 1933 (48 Stat. 31, U.S.-C.A. Title 7, Section 608a (6) as amended August 24, 1934, 49 Stat. 672) and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937, which invested the District Courts of the United States with jurisdiction specifically to enforce and to prevent and restrain any person from violating any order issued by the Secretary of Agriculture pursuant to the provisions of Title I of said Act.

III.

The purpose of this proceeding is to specifically enforce the provisions of a certain Order known as Order No. 53, "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which was issued by the Secretary of Agriculture of the United States pursuant to Section 8c of Title I of said Act, and also to prevent and restrain the defendants from handling lemons in the current of interstate commerce or in foreign commerce with Canada, or so as directly to burden, obstruct, or affect such commerce in such lemons, in violation of the provisions of the Order. [52]

IV.

The Secretary of Agriculture gave to all interested persons, including the defendants, and to each of them, on the 3rd day of October, 1940, notice of a public hearing to be held in the City of Los Angeles, State of California, on October 21, 1940, with respect to a proposed Order Regulating the Handling of Lemons Grown in the States of California and Arizona. Said hearing was held on the said 21st day of October, 1940.

V.

Subsequent to said hearing, the Secretary issued said Order No. 53 on the 5th day of April, 1941, which, by its terms, became effective April 10th, 1941, and has been continuously in effect thereafter, up to and including the present time.

The said Order No. 53 recites and provides:

“The Secretary, having reason to believe that the issuance of an order would tend to effectuate the declared policy of the act with respect to the establishment and maintenance of such orderly marketing conditions for lemons grown in the States of California and Arizona as would establish prices to the producers of such lemons at a level that would give such lemons a purchasing power with respect to articles that the producers thereof buy equivalent to the purchasing power of such lemons during the base period, August 1919—July 1929, conducted a public hearing at Los Angeles, Calif., on October 21, 1940, pursuant to

due notice given to all interested parties on October 3, 1940, on a proposed order regulating such handling of such lemons as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects such commerce in such lemons, at which hearing all interested persons in attendance were afforded due opportunity to be heard concerning the proposed order. [53]

“In accordance with the provisions of the act, it has been found and proclaimed that the purchasing power of lemons grown in the States of California and Arizona during the period August 1909—July 1914 cannot be satisfactorily determined from available statistics of the Department of Agriculture for the period August 1919—July 1929, and that the period August 1919—July 1929 is the base period to be used in connection with this order in determining the purchasing power of such lemons.

“Upon the basis of the evidence introduced at the hearing and the record thereof, it is hereby found:

“(1) That the terms and provisions of this order prescribe, so far as practicable, such different terms, applicable to different production areas, as are necessary to give due recognition to the difference in production and marketing of such lemons;

“(2) That this order is limited in its application to the smallest regional production area

that is practicable, consistently with carrying out the declared policy of the act, and that the issuance of several orders applicable to any subdivision of such regional production area would not effectively carry out the declared policy of the act; and

“(3) That this order and all the terms and conditions thereof will tend to effectuate the declared policy of the act with respect to lemons grown in the States of California and Arizona by establishing and maintaining such orderly marketing conditions therefor as will establish prices to the producers hereof at a level that will give such lemons a purchasing power with respect to articles that the producers thereof buy equivalent to the purchasing power of such lemons in the base period, and by protecting the interest of the consumer by (a) approaching the level of prices which it is declared in the act to be the policy of Congress to establish by a gradual correction of the [54] current level of prices at as rapid a rate as the Secretary deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and by (b) authorizing no action which has for its purpose the maintenance of prices to producers of such lemons above the level which it is declared in the act to be the policy of Congress to establish.

“It is further found:

“(1) That a marketing agreement regulating the handling of lemons grown in the States of California and Arizona, executed on the 5th day of April, 1941, upon which a hearing was held on October 21, 1940, was signed by handlers (excluding co-operative associations of producers who were not engaged in processing, distributing, or shipping the lemons covered by this order) who, during the period November 1, 1939—October 31, 1940, handled not less than eighty (80) percent of the volume of such lemons covered by this order;

“(2) That this order regulates the handling of such lemons in the same manner as the aforesaid marketing agreement, and that it is made applicable only to persons in the respective classes of industrial and commercial activity specified in the said marketing agreement;

“(3) That the issuance of this order is favored by producers who, during the period of November 1, 1939, to October 31, 1940, both dates inclusive (which is hereby determined to be a representative period), produced for market within the States of California and Arizona at least two-thirds ($2/3$) of the volume of lemons produced for market within such production area within the said period; and

“(4) That the issuance of this order is favored by three-fourths ($3/4$) of the producers who, during the aforesaid representative period of November 1, 1939, to October 31, 1940, have

been engaged, within the States of California and Arizona, in [55] the production for market of lemons.

“It Is, Therefore, Ordered, that such handling of lemons grown in the States of California and Arizona as is in the current of commerce between the State of California and any point outside thereof in the United States or in Canada, or between the State of Arizona and any point outside thereof in the United States or in Canada, from and after the date hereinafter specified, shall be in conformity to and in compliance with the terms and conditions of this order.”

VI.

The Order is applicable to handlers of lemons grown in the States of California and Arizona and regulates the handling of such lemons in the same manner as a Marketing Agreement executed by the Secretary on April 5, 1941.

VII.

Subsequent to the effective date of the Order and prior to April 23, 1941, the Secretary of Agriculture established a Lemon Administrative Committee and selected the members thereof, which said Committee is now and has, at all times since the establishment thereof, exercised the powers and performed the duties given and required by the Order.

VIII.

The defendants herein, and each of them, are handlers of lemons and engaged in the handling of lemons as those terms are defined in the said Order.

IX.

At the time of the institution of the foregoing proceedings herein there was pending on behalf of the defendants herein a petition before the Secretary of Agriculture for a review under Section 608c (15) (A) of Title 7, U.S.C.A., praying for a modification or exemption from said Order No. 53; said petition has now been dismissed by the Secretary of Agriculture and there is now pending in the United States [56] District Court for the Southern District of California, Central Division, an action by the aforesaid defendants pursuant to Section 608c (15) (B) of Title 7, U.S.C.A.

X.

The defendant La Verne Co-Operative Citrus Association, and the defendant Upland Orchards, Inc., on or about May 2, 1941, made and filed with the said Committee their respective written applications for a pro rate base and for allotments, and the defendant Glendora Co-Operative Citrus Association, on or about May 7, 1941, filed with the Committee its written application for a pro rate base and for allotments.

XI.

On May 31, 1941, upon the recommendation of said Lemon Administrative Committee and upon

other available information, the Secretary of Agriculture fixed and determined the pro rate bases for all handlers of lemons who applied for a pro rate base and allotment, including the defendants and each of them, and established a weekly regulation period for the handling and shipping of lemons, commencing June 1, 1941 and ending June 8, 1941, and fixed the quantity of lemons which could be handled and shipped from California and Arizona in interstate commerce and foreign commerce with Canada, for said weekly period, at 650 carloads of lemons; and fixed the allotment for the defendant La Verne Co-Operative Citrus Association at 3557 packed boxes of lemons; and for the defendant Glendora Co-Operative Citrus Association an allotment at 288 packed boxes of lemons; and for the defendant Upland Orchards, Inc., an allotment at 124 packed boxes of lemons, with an over-shipment privilege to La Verne Co-Operative Citrus Association of 406 packed boxes; and to Glendora Co-Operative Citrus Association of 406 packed boxes; and to Upland Orchards, Inc., of 406 packed boxes.

The defendant La Verne Co-Operative Citrus Association, during said weekly period beginning June 1, 1941 and ending June 8, [57] 1941, shipped 6561 packed boxes of lemons grown in California, in interstate commerce; and the defendant Glendora Co-Operative Citrus Association shipped 935 packed boxes of lemons grown in California, in interstate commerce; and the defendant Upland Orchards, Inc. shipped 1624 packed boxes of lemons grown in California, in interstate commerce.

XII.

The defendants, and each of them, since the effective date of said Order No. 53, have failed and refused to comply with the terms of said Order.

XIII.

The non-compliance or continued non-compliance by the defendants, and each of them, with provisions of the Order is, and will be, injurious to interstate commerce and foreign commerce with Canada, in lemons, and to growers, handlers and consumers of such fruit, and threatens the stability of such interstate and foreign commerce in lemons, which in turn will incite other handlers of lemons to violate the provisions of the said Order; and also incite handlers, subject to the Orders issued or which may hereafter be issued by the Secretary of Agriculture, to violate the provisions thereof. Such violations will tend to thwart the National policy of improving the marketing conditions with respect to the handling of lemons in interstate and foreign commerce.

CONCLUSIONS OF LAW

As conclusions of law under the provisions of law applicable to the foregoing Findings of Fact, the Court concludes as follows:

I.

That it has jurisdiction over all of the parties and the subject matter.

II.

That the notice given by the Secretary of Agriculture on [58] the 3rd day of October, 1940, of public hearing to be held in the City of Los Angeles, State of California, on October 21, 1940, with respect to a proposed Order regulating the handling of lemons grown in the States of California and Arizona, is, in so far as this action is concerned, conclusively presumed to have been duly and regularly made, and is valid.

III.

In so far as the proceedings herein are concerned, it is conclusively presumed that the hearing was held pursuant to and in accordance with said notice and General Regulations Series A, No. 1, of the Agricultural Adjustment Administration, United States Department of Agriculture, and that all interested persons, including the defendants herein, and each of them, were afforded full opportunity to be heard concerning the proposed Order.

IV.

In so far as these proceedings are concerned it is conclusively presumed that the Secretary found, from the evidence introduced at said hearing and the record thereof,—

“(1) That the terms and provisions of this order prescribe, so far as practicable, such different terms, applicable to different production areas, as are necessary to give due recognition to the difference in production and marketing of such lemons;

“(2) That this order is limited in its application to the smallest regional production area that is practicable, consistently with carrying out the declared policy of the act, and that the issuance of several orders applicable to any subdivision of such regional production area would not effectively carry out the declared policy of the act; and

“(3) That this order and all the terms and conditions thereof will tend to effectuate the declared policy of the act with respect to lemons grown in the States of California and [59] Arizona by establishing and maintaining such orderly marketing conditions therefor as will establish prices to the producers thereof at a level that will give such lemons a purchasing power with respect to articles that the producers thereof buy equivalent to the purchasing power of such lemons in the base period, and by protecting the interest of the consumer by (a) approaching the level of prices which it is declared in the act to be the policy of Congress to establish by a gradual correction of the current level of prices at as rapid a rate as the Secretary deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and by (b) authorizing no action which has for its purpose the maintenance of prices to producers of such lemons above the level which it is declared in the act to be the policy of Congress to establish by a gradual

correction of the current level of prices at as rapid a rate as the Secretary deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and by (b) authorizing no action which has for its purpose the maintenance of prices to producers of such lemons above the level which it is declared in the act to be the policy of Congress to establish.

“(4) That a marketing agreement regulating the handling of lemons grown in the States of California and Arizona, executed on the 5th day of April, 1941, upon which a hearing was held on October 21, 1940, was signed by handlers (excluding cooperative associations of producers who were not engaged in processing, distributing, or shipping the lemons covered by this order) who, during the period November 1, 1939—October 31, 1940, handled not less than eighty (80) percent of the volume of such lemons covered by this order; [60]

“(5) That this order regulates the handling of such lemons in the same manner as the aforesaid marketing agreement, and that it is made applicable only to persons in the respective classes of industrial and commercial activity specified in the said marketing agreement;

“(6) That the issuance of this order is favored by producers who, during the period of November 1, 1939, to October 31, 1940, both dates inclusive (which is hereby determined to be a representative period), produced for mar-

ket within the States of California and Arizona at least two-thirds ($2/3$) of the volume of lemons produced for market within such production area within the said period; and

“(7) That the issuance of this order is favored by three-fourths ($3/4$) of the producers who, during the aforesaid representative period of November 1, 1939, to October 31, 1940, have been engaged, within the States of California and Arizona in the production for market of lemons.”

V.

That the said Order No. 53 is applicable to all handlers of lemons grown in the States of California and Arizona shipped in interstate commerce or into the Dominion of Canada, from and after 12:01 o'clock a.m. on April 10, 1941.

VI.

In so far as these proceedings are concerned, it is conclusively presumed that the establishment by the Secretary of Agriculture of the Lemon Administrative committee and the selection of its members is in accordance with law, and valid, and that said Committee has at all times since its establishment legally exercised only the powers and performed the duties given and required by law.

VII.

The pro rate bases issued to each of the defendants herein, in so far as this particular action is

concerned, are conclusively presumed to have been regularly made and are valid. [61]

VIII.

The allotments issued to each of the defendants, in so far as this particular form of action is concerned, are conclusively presumed to have been regularly made and are valid.

IX.

The shipment by each of the said defendants herein of lemons grown in the State of California for interstate commerce, in excess of their respective said allotments, was in violation of law.

X.

The United States of America is entitled to a permanent injunction restraining the defendants, and each of them, their officers, agents, servants, employees, attorneys, assignees, and each of them, and all persons acting on behalf of said defendants or any of them, or claiming to act on behalf thereof, or any person in activity, consort, or participation of said defendants, or any of them, from handling lemons in violation of the terms and provisions of said Order No. 53, and to a judgment for costs in this proceeding.

Dated this 29th day of April, 1942.

BEN HARRISON

United States District Judge

Approved as to Form:

GUY RICHARDS CRUMP

EMMET H. WILSON, JR.

By

Attorneys for Defendants

Presented by:

WM. W. WORTHINGTON

Assistant U. S. Attorney

Attorney for Plaintiff

[Endorsed]: Filed April 29, 1942. [62]

In the District Court of the United States in and
for the Southern District of California Central
Division

No. 1596-BH—Civil

UNITED STATES OF AMERICA,

Plaintiff

vs.

LA VERNE CO-OPERATIVE CITRUS ASSO-
CIATION, a corporation; GLENDORA CO-
OPERATIVE CITRUS ASSOCIATION, a
corporation; and UPLANDS ORCHARDS,
INC., a corporation,

Defendants.

DECREE FOR PERMANENT INJUNCTION

The above entitled cause having been consolidated by order of the court and the restraining order herein having been continued until the hearing of the application for a preliminary injunction and filed in this action, all having come on regularly for hearing on the 31st day of October, 1941, and the 2nd day of April, 1942, upon the verified complaints, answers and stipulations, and the affidavits filed in support of and in opposition to the applications for preliminary injunctions, and the court having heard arguments of all counsel, and on the 29 day of April, 1942, having made and filed its written findings of fact and conclusions of law, and it appearing to the court that:

(a) The complaints herein seek to enforce and prevent [63] violations of Public No. 10, 73rd Congress (May 12, 1933) as amended and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, and of that order issued by the Secretary of Agriculture of the United States, after hearings held upon due notice and by virtue of the terms of said act and rules and regulations appertaining to such matters entitled "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order became effective on the 10th day of April, 1941, and has ever since said date and is now in full force and effect and operation.

(b) The defendants and each of them have

violated said order of the secretary in that they and each of them have shipped lemons grown in the state of California into interstate commerce in excess of the allotments fixed for them by the Secretary of Agriculture pursuant to said order.

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the said defendants and each of them, their officers, agents, employees, attorneys and assigns, and each of them, and all persons acting on behalf of said defendants or any of them or claiming to act on behalf thereof, or any person in active concert or participation with said defendants, or any of them, be restrained and enjoined from handling or shipping lemons grown in the states of California and Arizona in interstate commerce or to any place in the Dominion of Canada, in violation of, or contrary to the terms and provisions of the "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order was issued by the Secretary [64] of Agriculture on the 5th day of April, 1941, until further order of this court or until such time as an order or judgment may be entered in the United States District Court for the Southern District of California, Central Division, in which certain of these defendants have brought an action for a review of the secretary's denial of their petition filed pursuant to Subsection 15 of Section 608c, Title 7, U.S.C.A., which shall determine that said Order No. 53 is invalid or inapplicable to the plaintiffs therein.

It Is Further Ordered that plaintiff have costs herein.

Dated: Los Angeles, California, this 29 day of April, 1942.

BEN HARRISON

Judge U. S. District Court

The above and foregoing judgment was filed with the Clerk of said Court, and duly entered and docketed on the 29th day of April, 1942.

[Endorsed]: Filed and Entered April 29, 1942.

[65]

THE FOUR REMAINING CASES, NAMELY,
THE VENTURA CASE, THE WHITTIER
CASE, THE INDEX CASE, and THE
CHULA VISTA CASE.

THE COMPLAINTS THEREIN.

The Complaint in each of the remaining four cases, namely, the Ventura Case, (filed June 18, 1941), the Whittier Case, (filed June 28, 1941), the Index Case, (filed July 3, 1941), and the Chula Vista Case (filed June 24, 1941), contains the title of the Court and cause in the particular case, and otherwise is the same in form and substance as the complaint in the La Verne Case, hereinbefore set forth in full, with the exception that the respective weekly regulation periods, the fixed weekly allotments and the quantities of lemons shipped by each

respective defendant during such regulation periods in interstate or foreign commerce, including the amounts shipped in excess of said allotments and in alleged violation of said Order, vary as to each respective defendant.

TEMPORARY RESTRAINING ORDERS AND ORDERS TO SHOW CAUSE IN SAID FOUR REMAINING CASES.

A Temporary Restraining Order and Order to Show Cause was duly issued in each of said four remaining cases containing the title of the Court and cause in the particular case in which it was issued. Each of said Orders was signed by a Judge of said Court, and was duly served on the defendant therein named, and was issued and made returnable on the dates following, to-wit: [66]

In the Ventura Case, the Order was issued June 18, 1941, and made returnable June 23, 1941;

In the Whittier Case, the Order was issued on the 28th day of June, 1941, and made returnable July 7th, 1941;

In the Index Case, the Order was issued on July 3rd, 1941, and made returnable July 12th, 1941; and

In the Chula Vista Case, the Order was issued on July 8th, 1941, and made returnable July 14th, 1941.

Each of said Orders, except as above indicated, was the same in form and substance as the Temporary Restraining Order and Order to Show Cause in the La Verne Case, hereinbefore set forth in full.

ANSWERS IN SAID FOUR REMAINING
CASES.

Within the time allowed by law each respective defendant in said four remaining cases served and filed its verified answer. Each of said answers contains the title of said Court and cause in which the same was filed, and is the same in form and substance and raises the same issues as the answer of defendant LaVerne Co-Operative Citrus Association, a corporation, in the LaVerne Case, hereinbefore set forth in full, except that the allegations of said respective answers concerning the weekly regulation periods, the percentages of pro-rate bases, the fixed weekly allotments and the quantities of lemons shipped by each respective defendant are directed to and apply to the particular defendant filing said answer, and differ in that respect from said answer in said La Verne Case.

And except also, that Paragraph I. of the separate and further defense in each of said four answers contains not only the [67] language found in Paragraph I. of the separate and further defense in said answer in the La Verne Case, but also the following additional language:

“Due to variation in types and varieties of lemons, and in producing conditions peculiar to different producing areas within these states, heavy picks occur in certain areas at times different from heavy picks in other areas; and the type, variety and condition of lemons in some areas frequently require a different time or method of handling, shipping and marketing than in other producing areas.”

And except also, that each of said four answers, in the separate and further defense therein set forth, contains an additional paragraph not found in said separate and further defense in said answer in the La Verne Case, which additional paragraph reads as follows:

“Said Order as applied and administered by said committee, and by the Secretary on the recommendation of said committee, is arbitrary, unreasonable, unjust and discriminatory as against defendant; in that, as defendant is informed and believes and on that ground avers, competitors of defendant have been given excessive advance credits for lemons marketed in other than fresh fruit channels, advance credits for unmerchantable lemons, and excessive prorate bases, with the result that some of such competitors have received larger allotments than they are entitled to under said Order, and that defendant has received correspondingly smaller allotments than it is entitled to; also because certain handlers have been, and are being, permitted to ship without being required to limit their shipments.” [68]

VENTURA CASE.

[Title Court and Cause in the Ventura Case.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law in this case are in the same form, are numbered the same as, and are identical with the correspondingly num-

bered findings of fact and conclusions of law in the La Verne Case, hereinbefore set forth, except as follows:

FINDINGS OF FACT.

I.

This action is brought by the United States of America against the defendant, Ventura County Orange and Lemon Association, a California corporation, with its principal place of business at Montalvo, California.

X.

The defendant, Ventura County Orange and Lemon Association, on or about May 8, 1941, made and filed with the said Committee its written application for a pro rate base and for allotments.

XI.

On May 31, 1941, upon the recommendation of said Lemon Administrative Committee and upon other available information, the Secretary of Agriculture fixed and determined the pro rate bases for all handlers of lemons who applied for a pro rate base and allotment, including the defendant, and established a weekly regulation period for the handling and shipping of lemons, commencing June 1, 1941 and ending June 8, 1941, and fixed the quantity of lemons which could be handled and shipped from California and Arizona in interstate commerce and foreign commerce with Canada, for said weekly period, at 650 car- [69] loads of lemons; and fixed the allotment for the defendant

at 3251 packed boxes of lemons with an overshipment privilege to defendant of 406 packed boxes; and established a weekly regulation period for the handling and shipping of lemons, commencing June 8, 1941 and ending June 15, 1941, and fixed the quantity of lemons which could be handled and shipped from California and Arizona in interstate commerce and foreign commerce with Canada, for said weekly period, at 575 carloads of lemons; and fixed the allotment for the defendant at 287 packed boxes with an overshipment privilege of 406 packed boxes of lemons.

The defendant during said weekly period beginning June 1, 1941 and ending June 8, 1941, shipped 3392 packed boxes of lemons grown in California, in interstate commerce; and during said weekly period beginning June 8, 1941 and ending June 15, 1941, shipped 6293 packed boxes of lemons grown in California, in interstate commerce.

[Endorsed]: Filed April 29, 1942. [70]

WHITTIER CASE.

[Title Court and Cause in the Whittier Case.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law in this case are in the same form, are numbered the same as, and are identical with the correspondingly numbered findings of fact and conclusions of law in the

La Verne Case, hereinbefore set forth, except as follows:

FINDINGS OF FACT.

I.

This action is brought by the United States of America against the defendant Whittier Mutual Orange & Lemon Association, a California corporation, with its principal place of business at Whittier, California.

X.

The defendant, on or about May 1, 1941, made and filed with the said Committee its written application for a pro rate base and for an allotment.

XI.

On May 31, 1941, upon the recommendation of said Lemon Administrative Committee and upon other available information, the Secretary of Agriculture fixed and determined the pro rate bases for all handlers of lemons who applied for a pro rate base and allotment, including the defendant herein, and established a weekly regulation period for the handling and shipping of lemons, commencing June 15, 1941, and ending June 22, 1941, and fixed the quantity of lemons which could be handled and shipped from California and Arizona in interstate commerce and foreign commerce with Canada for said weekly [71] period, at 550 carloads of lemons; and fixed the allotment for the defendant at 389 packed boxes of lemons; with an overshipment privilege to defendant of 406 packed boxes;

The defendant during said weekly period beginning June 15, 1941 and ending June 22, 1941, shipped 1408 packed boxes of lemons grown in California, in interstate commerce;

[Endorsed]: Filed April 29, 1942. [72]

INDEX CASE.

[Title Court and Cause in the Index Case.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law in this case are in the same form, are numbered the same as, and are identical with the correspondingly numbered findings of fact and conclusions of law in the La Verne Case, hereinbefore set forth, except as follows:

FINDINGS OF FACT.

I.

This action is brought by the United States of America against the defendant Index Mutual Association, a California corporation, with its principal place of business at La Habra, California.

X.

The defendant, on or about April 30, 1941, made and filed with the said Committee its written application for a pro rate base and for an allotment.

XI.

On May 31, 1941, upon the recommendation of said Lemon Administrative Committee and upon other available information, the Secretary of Agriculture fixed and determined the pro rate bases for all handlers of lemons who applied for a pro rate base and allotment, including the defendant herein, and established a weekly regulation period for the handing and shipping of lemons, commencing June 22, 1941 and ending June 29, 1941, and fixed the quantity of lemons which could be handled and shipped from California and Arizona in interstate commerce and foreign commerce with Canada, for said weekly period, at [73] 700 carloads of lemons; and fixed the allotment for the defendant at 713 packed boxes of lemons;

The defendant during said weekly period beginning June 22, 1941, and ending June 29, 1941, shipped 2436 packed boxes of lemons grown in California, in interstate commerce;

[Endorsed]: Filed April 29, 1942. [74]

CHULA VISTA CASE.

[Title Court and Cause in the Chula Vista Case.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The findings of fact and conclusions of law in this case are in the same form, are numbered the same as, and are identical with the correspondingly

numbered findings of fact and conclusions of law in the La Verne Case, hereinbefore set forth, except as follows:

FINDINGS OF FACT.

I.

This action is brought by the United States of America against the defendant Chula Vista Mutual Lemon Association, a California corporation, with its principal place of business at Chula Vista, California.

X.

The defendant, on or about May 3, 1941, made and filed with the said Committee its written application for a pro rate base and for an allotment.

XI.

On May 31, 1941, upon the recommendation of said Lemon Administrative Committee and upon other available information, the Secretary of Agriculture fixed and determined the pro rate bases for all handlers of lemons who applied for a pro rate base and allotment, including the defendant herein, and established a weekly regulation period for the handling and shipping of lemons, commencing June 1, 1941 and ending June 8, 1941, and fixed the quantity of lemons which could be handled and shipped from California and Arizona in interstate commerce and foreign commerce with Canada, for said weekly [75] period, at 650 carloads of lemons; and fixed the allotment for the

defendant at 2673 packed boxes of lemons; with an overshipment privilege to defendant of 406 packed boxes;

The defendant during said weekly period beginning June 1, 1941, and ending June 8, 1941, shipped 7086 packed boxes of lemons grown in California, in interstate commerce;

[Endorsed]: Filed April 29, 1942. [76]

VENTURA CASE.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 1597-BH Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

VENTURA COUNTY ORANGE AND LEMON
ASSOCIATION, a corporation,

Defendant.

DECREE FOR PERMANENT INJUNCTION

The above entitled cause having been consolidated by order of the court and the restraining order herein having been continued until the hearing of the application for a preliminary injunction and filed in this action, all having come on regu-

larly for hearing on the 31st day of October, 1941, and the 2nd day of April, 1942, upon the verified complaint, answer, stipulations, and affidavits filed in support of, and in opposition to, the application for preliminary injunction, and the court having heard arguments of counsel, and on the 29 day of April, 1942, having made and filed its written findings of fact and conclusions of law, and it appearing to the court that:

(a) The complaint herein seeks to enforce and prevent violations of Public No. 10, 73rd [77] Congress (May 12, 1933) as amended and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, and of that order issued by the Secretary of Agriculture of the United States, after hearings held upon due notice and by virtue of the terms of said act and rules and regulations appertaining to such matters entitled "Order Regulating the Handling of Lemons Grown in the States of California and Arizona", which said order became effective on the 10th day of April, 1941, and has been ever since said date and is now in full force and effect and operation.

(b) The defendant has violated said order of the secretary in that it has shipped lemons grown in the state of California into interstate commerce in excess of the allotments fixed for it by the Secretary of Agriculture pursuant to said order.

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the said defendant, its officers, agents, employees, attorneys, and assigns, and each of them, and all persons acting on behalf of said defendant or claiming to act on behalf thereof, or any person in active concert or participation with said defendant, be restrained and enjoined from handling or shipping lemons grown in the states of California and Arizona in interstate commerce or to any place in the Dominion of Canada, in violation of, or contrary to, the terms and provisions of the "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order was issued by the Secretary of Agriculture on the 5th day of April, 1941, until further order of this court or until such time [78] as an order or judgment may be entered in the United States District Court for the Southern District of California, Central Division, in which this defendant has brought an action for a review of the secretary's denial of its petition filed pursuant to Subsection 15 of Section 608c, Title 7, U.S.C.A., which shall determine that said Order No. 53 is invalid or inapplicable to the plaintiff therein.

It Is Further Ordered that plaintiff have costs herein.

Dated: Los Angeles, California, this 29 day of April, 1942.

BEN HARRISON

United States District Judge

The above and foregoing judgment was filed with the Clerk of said Court, and duly entered and docketed on the 29th day of April, 1942.

[Endorsed]: Filed and Entered April 29, 1942.

[79]

WHITTIER CASE.

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 1620-BH Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

WHITTIER MUTUAL ORANGE & LEMON
ASSOCIATION, a corporation,

Defendant.

DECREE FOR PERMANENT INJUNCTION

The above entitled cause having been consolidated by order of the court and the restraining order herein having been continued until the hearing of the application for a preliminary injunction and filed in this action, all having come on regu-

larly for hearing on the 31st day of October, 1941, and the 2nd day of April, 1942, upon the verified complaint, answer, stipulations, and affidavits filed in support of, and in opposition to, the application for preliminary injunction, and the court having heard arguments of counsel, and on the 29 day of April, 1942, having made and filed its written findings of fact and conclusions of law, and it appearing to the court that:

(a) The complaint herein seeks to enforce and prevent violations of Public No. 10, 73rd [80] Congress (May 12, 1933) as amended and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, and of that order issued by the Secretary of Agriculture of the United States, after hearings held upon due notice and by virtue of the terms of said act and rules and regulations appertaining to such matters entitled "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order became effective on the 10th day of April, 1941, and has been ever since said date and is now in full force and effect and operation.

(b) The defendant has violated said order of the secretary in that it has shipped lemons grown in the state of California into interstate commerce in excess of the allotments fixed for it by the Secretary of Agriculture pursuant to said order.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the said defendant, its officers, agents, employees, attorneys, and assigns, and each of them, and all persons acting on behalf of said defendant or claiming to act on behalf thereof, or any person in active concert or participation with said defendant, be restrained and enjoined from handling or shipping lemons grown in the states of California and Arizona in interstate commerce or to any place in the Dominion of Canada, in violation of, or contrary to, the terms and provisions of the "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order was issued by the Secretary of Agriculture on the 5th day of April, 1941, until further order of this court or until such time as [81] an order or judgment may be entered in the United States District Court for the Southern District of California, Central Division, in which this defendant has brought an action for a review of the secretary's denial of its petition filed pursuant to Subsection 15 of Section 608c, Title 7, U.S.C.A., which shall determine that said Order No. 53 is invalid or inapplicable to the plaintiff therein.

It Is Further Ordered that plaintiff have costs herein.

Dated: Los Angeles, California, this 29 day of April, 1942.

BEN HARRISON

United States District Judge

The above and foregoing judgment was filed with the Clerk of said Court, and duly entered and docketed on the 29th day of April, 1942.

[Endorsed]: Filed and Entered April 29, 1942.

[82]

INDEX CASE.

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 1635-BH Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

INDEX MUTUAL ASSOCIATION,

a corporation,

Defendant.

DECREE FOR PERMANENT INJUNCTION.

The above entitled cause having been consolidated by order of the court and the restraining order herein having been continued until the hearing of the application for a preliminary injunction and all filed in this action, all having come on

regularly for hearing on the 31st day of October, 1941, and the 2nd day of April, 1942, upon the verified complaint, answer, stipulations, and affidavits filed in support of, and in opposition to, the application for preliminary injunction, and the court having heard arguments of counsel, and on the 29 day of April, 1942, having made and filed its written findings of fact and conclusions of law, and it appearing to the court that:

(a) The complaint herein seeks to enforce and prevent violations of Public No. 10, 73rd [83] Congress (May 12, 1933) as amended and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, and of that order issued by the Secretary of Agriculture of the United States, after hearings held upon due notice and by virtue of the terms of said act and rules and regulations appertaining to such matters entitled "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order became effective on the 10th day of April, 1941, and has been ever since said date and is now in full force and effect and operation.

(b) The defendant has violated said order of the secretary in that it has shipped lemons grown in the state of California into interstate commerce in excess of the allotments fixed for it by the Secretary of Agriculture pursuant to said order.

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the said defendants, its officers, agents, employees, attorneys, and assigns, and each of them, and all persons acting on behalf of said defendant or claiming to act on behalf thereof, or any person in active concert or participation with said defendant, be restrained and enjoined from handling or shipping lemons grown in the states of California and Arizona in interstate commerce or to any place in the Dominion of Canada, in violation of, or contrary to, the terms and provisions of the "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order was issued by the Secretary of Agriculture on the 5th day of April, 1941, until further order of this court or until such [84] time as an order or judgment may be entered in the United States District Court for the Southern District of California, Central Division, in which this defendant has brought an action for a review of the secretary's denial of its petition filed pursuant to Subsection 15 of Section 608c, Title 7, U.S.C.A., which shall determine that said Order No. 53 is invalid or inapplicable to the plaintiff therein.

It Is Further Ordered that plaintiff have costs herein.

Dated: Los Angeles, California, this 29 day of April, 1942.

BEN HARRISON

United States District Judge.

The above and foregoing judgment was filed with the Clerk of said Court, and duly entered and docketed on the 29th day of April, 1942.

[Endorsed]: Filed and Entered Apr. 29, 1942.

[85]

CHULA VISTA CASE.

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 110-SD (BH) Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHULA VISTA MUTUAL LEMON ASSOCIATION, a corporation organized and existing under the laws of California,

Defendant.

DECREE FOR PERMANENT INJUNCTION

The above entitled cause having been consolidated by order of the court and the restraining order

herein having been continued until the hearing of the application for a preliminary injunction and filed in this action, all having come on regularly for hearing on the 31st day of October, 1941, and the 2nd day of April, 1942, upon the verified complaint, answer, stipulations, and affidavits filed in support of, and in opposition to, the application for a preliminary injunction, and the court having heard arguments of counsel, and on the 29 day of April, 1942, having made and filed its written findings of fact and conclusions of law, and it appearing to the court that:

(a) The complaint herein seeks to enforce and prevent violations of Public No. 10, 73rd [86] Congress (May 12, 1933) as amended and re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, and of that order issued by the Secretary of Agriculture of the United States, after hearings held upon due notice and by virtue of the terms of said act and rules and regulations appertaining to such matters entitled "Order Regulating the Handling of Lemons Grown in the States of California and Arizona", which said order became effective on the 10th day of April, 1941, and has been ever since said date and is now in full force and effect and operation.

(b) The defendant has violated said order

of the secretary in that it has shipped lemons grown in the state of California into interstate commerce in excess of the allotments fixed for it by the Secretary of Agriculture pursuant to said order.

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the said defendant, its officers, agents, employees, attorneys, and assigns, and each of them, and all persons acting on behalf of said defendant or claiming to act on behalf thereof, or any person in active concert or participation with said defendant, be restrained and enjoined from handling or shipping lemons grown in the states of California and Arizona in interstate commerce or to any place in the Dominion of Canada, in violation of, or contrary to, the terms and provisions of the "Order Regulating the Handling of Lemons Grown in the States of California and Arizona," which said order was issued by the Secretary of Agriculture on the 5th day of April, 1941, until further order of this court or until such time as an order or [87] judgment may be entered in the United States District Court for the Southern District of California, Central Division, in which this defendant has brought an action for a review of the secretary's denial of its petition filed pursuant to Subsection 15 of Section 608c, Title 7, U.S.C.A., which shall determine that said Order No. 53 is invalid or inapplicable to the plaintiff therein.

It Is Further Ordered that plaintiff have costs herein.

Dated: Los Angeles, California, this 29 day of April, 1942.

BEN HARRISON,
United States District Judge.

The above and foregoing judgment was filed with the Clerk of said Court, and duly entered and docketed on the 29th day of April, 1942.

[Endorsed]: Filed and entered April 29, 1942.
[88]

[Title of Court and Cause in the Ten Consolidated Causes.]

THE RECORD OF THE CAUSES AS
CONSOLIDATED

STIPULATION AND ORDER CONSOLIDAT-
ING TEN CAUSES.

It is hereby stipulated and agreed that the above entitled actions will involve substantially common questions of law and of fact and that said actions may be consolidated.

It is further stipulated and agreed that this stipulation shall be without prejudice to any party or to the United States to move the court for an

order of severance of one or more of such consolidated actions.

Dated: September 4, 1941.

WM. FLEET PALMER,

United States Attorney,

JAMES L. CRAWFORD,

Assistant United States At-
torney, Attorneys for Plain-
tiff.

GUY RICHARDS CRUMP,

EMMET H. WILSON, JR.,

By GUY RICHARDS CRUMP,

Attorneys for Defendants

Index Mutual Association, a
corporation,

LaVerne Co-Operative Citrus
Association, a corporation,

Glendora Co-Operative Citrus
Association, a corporation,

Upland Orchards, Inc., a cor-
poration,

Ventura County Orange and
Lemon Association, a corpo-
ration,

Whittier Mutual Orange &
Lemon Association, a corpo-
ration,

Chula Vista Mutual Lemon
Association, a corporation,
etc.

G. V. WEIKERT,

Attorney for Defendants

Orange Belt Fruit Distributors, Inc., a corporation, etc.
Paramount Citrus Association, Inc., a corporation,
etc.,

Samuel Perricone, etc. [89]

PETER T. RICE,

Attorney for Defendants

Cahill-Battaglia, Inc., a corporation,
William P. Pann, etc.,

Irving Sarnoff, etc.,

A. M. Goodman.

It is ordered that the above entitled actions be, and they are, consolidated.

Dated: September 5, 1941.

HARRISON,

U. S. District Judge.

STIPULATION AND ORDERS CONTINUING
RESTRAINING ORDER AND APPLICATION
FOR PRELIMINARY INJUNCTION
TO TRIAL OF CAUSES.

The court, through and by its several orders made and entered to that effect in the La Verne Case, Ventura Case, Whittier Case, Index Case and the Chula Vista Case, which orders were based upon the stipulation of the parties, duly and regularly continued the return or hearing on the order to

show cause why a preliminary injunction should not issue in each of said five mentioned actions until the trial of said causes on the merits, and also continued in full force and effect the temporary restraining order theretofore issued in each of said actions until the time of such trial; also continued the application of plaintiff for a preliminary injunction until the time of such trial. [90]

DEFENDANTS' MOTION FOR DISCOVERY
AND PRODUCTION OF DOCUMENTS
UNDER RULE 34 F.R.C.P.

Defendants served and filed their notice of motion directed to the plaintiff, United States of America, and its attorneys, and reading as follows, to-wit:

[Title Court and Cause in the Ten Consolidated Cases.]

You and Each of You Will Please Take Notice that defendants LaVerne Co-Operative Citrus Association, Glendora Co-Operative Citrus Association, Upland Orchards, Inc., Ventura County Orange & Lemon Association, Orange Belt Fruit Distributors, Inc., Whittier Mutual Orange & Lemon Association, Index Mutual Association, and Chula Vista Mutual Lemon Association will move the above entitled court, before Honorable Ben Harrison, in the court room of said Judge in the Federal Building, in the City of Los Angeles,

on the 15th day of December, 1941, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order under Rule 34 of the Rules of Civil Procedure, directing the plaintiff herein to produce and permit the inspection and copying or photographing by or on behalf of the moving defendants of the hereinafter designated documents and papers, which are not privileged and which constitute or contain evidence material to matters involved in the above mentioned consolidated actions and which are in the possession or under the custody or control of plaintiff.

Said motion will be made upon the records and files in said consolidated actions and upon the affidavit of Guy Richards Crump and points and authorities in support hereof, which are served and filed concurrently herewith. [91]

The documents and papers the inspection, copying or photographing of which is hereby requested, are the following:

1. All certificates of allotment and other documents or papers issued by the Lemon Administrative Committee to handlers of lemons in the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego, in the State of California, from and after the effective date of Order No. 53, referred to in said affidavit of Guy Richards Crump, to the date of inspection, showing or including advance credit counts.

2. All field notes and reports of field men

and agents of said Lemon Administrative Committee made to it, and all documents, records and papers showing actions of said Committee, its officers, employes and agents, giving or purporting to give advance counts pursuant to Section 953.4 (d) (4), including all reports and computations made to said Committee by its officers, employes and agents, showing the estimated storage life of lemons.

All of the documents and papers referred to in this paragraph 2 have reference to all handlers in the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego, to whom advance credit counts have been given by said Committee.

3. All computations of quantities of lemons made by said Lemon Administrative Committee, its agents or employes, pursuant to section 953.4 (d) (5) of said Order and all certificates of allotment or other documents or papers issued to handlers by said Committee showing or including such computations or the result thereof. The foregoing has reference to handlers in the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego. [92]

Attached hereto are points and authorities in support of said motion.

Dated: Los Angeles, California, December 8, 1941.

(Duly signed by the attorneys for these ap-

pealing defendants, and G. V. Weikert, as Attorney for defendant Orange Belt Fruit Distributors, Inc.)

With said notice, and in support of said motion, said defendants served and filed their memorandum of points and authorities and the affidavit of Guy Richards Crump, which said affidavit reads as follows, to-wit:

I am one of the attorneys for defendants LaVerne Co-Operative Citrus Association, Glendora Co-Operative Citrus Association, Upland Orchards, Inc., Ventura County Orange & Lemon Association, Whittier Mutual Orange & Lemon Association, Index Mutual Association and Chula Vista Mutual Lemon Association, and make this affidavit in behalf of said defendants and also in behalf of defendant Orange Belt Fruit Distributors, Inc., which is represented by G. V. Weikert, Esquire.

Plaintiff has in its possession or within its custody or control certain documents and papers which contain evidence material to issues involved in the above entitled actions, and which defendants represented by affiant and by said Weikert desire to inspect and to copy or photograph, pursuant to the provisions of Rule 34 of the Rules of Civil Procedure.

The consolidated actions are brought by the United States of America to enjoin alleged violations of an order regulating the handling of lemons grown in the states of California and Arizona, known and referred to in the pleadings as Order

No. 53, which order was issued by the Secretary of Agriculture of the United States purportedly pursuant to Section 8a (6) of Title I of the Act of [93] May 12, 1933 (48 Stat. 31 U.S.C. Title 7, section 608a (6), as amended August 24, 1934, 49 Stat. 672) and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public No. 137, 75th Congress) (said Act of May 12, 1933, as reenacted and amended being hereinafter referred to as "the Act").

Said Order provides, among other things, (section 953.4 (d) (4):

(The affidavit then quotes the language of said Section 953.4 (d) (4) of said Order No. 53, which is hereinbefore set out in full as a part of Exhibit "A", attached to the complaint in the LaVerne Case.)

The several complaints herein allege that the Secretary of Agriculture, pursuant to the provisions of section 953.4 of said Order, fixed and determined prorate bases for all handlers of lemons who applied for prorate bases and for allotments, including defendants and each of them, and established weekly regulation periods for the handling and shipping of lemons, commencing June 1, 1941; that the Secretary of Agriculture has fixed allotments for the various defendants pursuant to said Order and that said defendants have sold, handled and shipped lemons in the current of interstate commerce and foreign commerce with Canada in dis-

regard, defiance and violation of the applicable provisions of the order and of the regulations issued thereunder and in excess of the respective allotments fixed by said Secretary of Agriculture and allowed to defendants respectively.

The answers of the defendants represented by affiant and by said Weikert allege, among other things:

“Said Order as applied and administered by said committee (the Lemon Administrative Committee appointed pursuant to said Order) and the Secretary on the re- [94] commendation of said committee, is arbitrary, unreasonable, unjust and discriminatory as against the respective defendants in that, as defendants are informed and believe and on that ground aver, competitors of said defendants have been given excessive advance credits for lemons marketed in other than fresh fruit channels, advance credits for unmerchantable lemons, and excessive prorated bases, with the result that such competitors have received larger allotments than they were entitled to under said Order, and that defendants have received correspondingly smaller allotments than they were entitled to.”

From time to time requests have been made by handlers (other than defendants) advising said Lemon Administrative Committee that such handlers desired to market lemons in other than fresh fruit channels and requesting said Committee to compute the number of weeks that such lemons

could be held in storage, under commercial storage conditions, and, at the expiration of such period, would meet the requirements for marketing under applicable laws. Pursuant to such advices and requests said Committee has from time to time caused computations to be made of such lemons, and said Committee has included the lemons so counted as a part of the available lemons of such handlers for the number of weeks computed by said Committee.

As alleged in the answers of the defendants represented by affiant and said Weikert, said defendants have been informed and believe that the counts so given have been excessive insofar as competitors of said defendants are concerned, in that said Committee has given advance credits for unmerchantable lemons and excessive prorated bases based upon such excessive counts.

In order to defend against the allegations of the Government that the respective defendants have shipped excessive amounts of lemons in disregard, defiance and violation of the applicable provisions of the said Order and of the regulations issued thereunder, and in order to obtain the necessary evidence to prove the allegations of the respective answers of said defendants with respect to such advance counts, it is necessary that defendants be permitted to inspect the records in the possession of said Lemon Administrative Committee showing the advance counts given to competing handlers of lemons and the bases upon which such advance counts were made, particularly the amount of ad-

vance counts and the computations of the number of weeks that the lemons included in such advance counts could be held in storage under commercial storage conditions, together with the total weekly allotments given to such competing houses by the Secretary of Agriculture and on the recommendation of said Lemon Administrative Committee, and the percentage of the total approved quantity of lemons available for current shipment during each weekly period allotted to each of such competing houses. For the same reason it is necessary that said defendants be permitted to inspect and copy or photograph the documents and papers referred to in paragraph numbered 3 hereinbelow set forth.

Such evidence is relevant and material to the issues herein, and the documents and papers in which the same is contained are, and are hereby designated to be the following:

1. All certificates of allotment and other documents or papers issued by said Lemon Administrative Committee to handlers of lemons in the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego, in the State of California, from and after the effective date of said Order to the date of inspection, showing or including advance credit counts.

2. All field notes and reports of field men and agents of said Lemon Administrative Committee made to it, and all documents, records and papers showing actions of [96] said Committee, its officers, employes and agents, giving

or purporting to give advance counts pursuant to Section 953.4 (d) (4), including all reports and computations made to said Committee by its officers, employes and agents, showing the estimated storage life of lemons.

All of the documents and papers referred to in this paragraph 2 have reference to all handlers in the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego, to whom advance credit counts have been given by said Committee.

3. All computations of quantities of lemons made by said Lemon Administrative Committee, its agents or employes, pursuant to section 953.4 (d) (5) of said Order and all certificates of allotment or other documents or papers issued to handlers by said Committee showing or including such computations or the result thereof. The foregoing has reference to handlers in the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego.

GUY RICHARDS CRUMP

Subscribed and sworn to before me this 8th day of December, 1941

[Notarial Seal] HERTHA N. EBERT,
Notary Public in and for the County of Los Angeles, State of California.

The plaintiff, United States of America, resisted said motion by serving and filing its written "Points and Authorities in Opposition to Motion for Discovery and Production."

Said motion was presented and argued to the court on December 15, 1941, and submitted for decision. On December 18, 1941, said Court, by its Minute Order to that effect, denied said motion in its entirety. [97]

PRE-TRIAL PROCEEDINGS

The court, in its Minute Order, of date December 15, 1941, made and entered in the ten consolidated causes provided, among other things, as follows:

“It is further ordered that these consolidated causes are set down for pre-trial at 9:30 A.M. December 18, 1941.”

On December 18, 1941, a pre-trial conference or hearing was had before the court, Honorable Ben Harrison, Judge presiding, at which certain rulings were orally made by the court, but no reporter was present and no record was made of said rulings. The only record or evidence of said pre-trial proceedings, or the rulings made thereat, are the Minutes of said court of date December 18, 1941, (hereinafter set forth), and the references made to said pre-trial conferences and the rulings of the court at said conferences as the same appear hereafter in this agreed statement in the record of the proceedings at the trial of said consolidated cases.

Said Minutes of December 18, 1941, read as follows:

[Title Court and Causes in the Ten Consolidated Actions.]

The nine consolidated causes entitled above now coming on for pre-trial hearing; Walter M. Campbell, Assistant U. S. Attorney, appearing as counsel for the Government; Guy Richards Crump, Esq., appearing as counsel for the defendants in cases Nos. 110-Civil Southern Division, 1596-Civil, 1597-Civil, 1620-Civil, and 1635-Civil; G. V. Weikert, Esq., appearing as counsel for defendant in case No. 1598;

Attorney Campbell makes a statement to the Court relative to certain recent decisions.

The Court makes a statement relative to the motion of certain defendants filed December 8, 1941, under Rule 34 of the F. R. C. P., for production, inspection, and copying by defendants of the documents [98] and papers designated in said motion, which was heretofore on December 15, 1941, heard and submitted, and now orders said motion of defendants denied on the ground that the proposed evidence is immaterial herein. The Court makes a further statement as to the nature of these cases and of the issues.

Attorney Crump makes a statement that he is raising the constitutionality of the order of the Secretary of Agriculture and the orders of the committee thereunder.

Attorney Campbell makes a statement on behalf of the Government.

Attorney Crump makes a further statement and

refers to and reads from the Answer of the defendant Glendora Citrus Association in case No. 1596-BH Civil and states the position of the defendants respecting the question of the constitutionality of the orders as being violative of the Fifth Amendment to the Constitution of the United States, and makes a further statement of the matters contained in the Answer above referred to and with respect to which there is no stipulation by the Government, and which the defendants will seek to offer proof in support of.

The Court and counsel appearing discuss further the issues herein and the nature of the evidence to be offered herein.

The Court orders that counsel furnish to the Court by 3 P.M. today their points and citations of authorities which they desire to present for the consideration of the Court.

STIPULATION OF FACTS

All of the parties to said ten consolidated cases made and entered into their two stipulations of facts for use at and which were received in evidence at the trial of said consolidated cases. Said stipulations were in writing, and were and are in the words and figures following, to-wit: [99]

[Title Court and Said Consolidated Causes.]

STIPULATION OF FACTS

It Is Hereby Stipulated and agreed by and between the parties hereto, through their respective counsel, that:

I.

The commercial production of lemons in the United States is confined almost entirely to the State of California. In California there are about 6,000 growers growing lemons on more than 69,000 acres. In Arizona there are less than 500 acres planted in lemons. The average annual on tree farm value of California lemons for the five years ending with the 1939-40 marketing season amounted to \$16,000,000. The marketing season begins on November 1st of one year and ends on October 31st of the next year.

The shipment of lemons from California is primarily interstate in character. During five marketing seasons, ending with the 1938-39 marketing season, an average of 79% of the total annual production of lemons in California was shipped for commercial fresh consumption. Of this total, approximately 90% was shipped to markets outside the State of California. Lemons from California are shipped throughout the United States to Canada and other foreign countries. Practically the entire supply of lemons consumed in the United States is grown in and shipped from California; less than 1% from Arizona. Lemons are picked and shipped in every month of the year. The heaviest picks for California and Arizona as a whole generally occur in the months of February, March, April and May. Shipments are generally heaviest during the months of May, June, July and August.

II.

Lemons are a tree crop which require from 4 to 6 years to bring to production. Although trees produce the year around, there are different peaks of productivity. The fruit is usually picked [100] when it attains a marketable size, this being determined by the use of a ring, the size depending upon the picking policy of the particular producer involved, marketing conditions at the time and the condition of the fruit. When lemons are picked they are placed in picking (or field) boxes and hauled to a packing house or other shipping point. When they arrive at the packing house they are washed and sorted for color. At this time low grade lemons, referred to as "washer culls", are removed. At this time, also, the most efficient packing houses roughly classify the lemons by size so as to avoid the necessity later in packing operation of handling unwanted sizes in order to pack desired sizes.

After lemons not suitable for sale in the opinion of the producer or handler in fresh fruit form have been eliminated the remainder are generally, but not always, placed in storage, usually in basements which are often air-conditioned, and are there held until they are to be prepared for market. When that time comes they are removed from the storage rooms and placed upon grading belts where they are graded by handlers and sized largely by eye, after which they are packed in standard packing boxes for shipment. Fruit sold within the State of California is generally sold loose without packing. An

elimination again takes place during this final operation when any unmarketable fruit, or fruit which the handler does not wish to market, is set aside for by-products disposition.

III.

Peak picks of lemons are generally later in the season in the coastal areas of California than in the interior. The coastal areas include several Southern California Counties but the greatest acreage of coastal lemons is located in Ventura and Santa Barbara Counties in which there have been a greater percentage of recent plantings than in other counties. Lemons are classified with reference to maturity and color as dark green, light green, silver and tree ripe (yellow). In the interior sections of California a [101] considerable portion of the picks are of tree ripes, coming mostly at one time, whereas the coastal areas also have tree ripe lemons but do not have such proportionately heavy picks at one time and they are more uniformly of a dark green color. Green lemons keep in storage longer than silvers and silvers longer than tree ripes. Tree ripes will keep in sotrage from 10 days to 6 weeks; dark greens as long as 6 months. This difference in storage life is due not only to color at the time of picking but also to the uniform growth rate the fruit has had during the growth season. In the coastal areas there is less variation in climatic conditions and the fruit has a more uniform growth period than it does in the interior, which in the winter months are subject to greater cold and in

the summer time to a higher temperature and a more arid atmosphere. There is a marked difference in the proportion of tree ripes in different grove in the same district; the age of the trees, their physical condition and soil condition being controlling factors. The proportion of tree ripes in the same orchard varies markedly from year to year due to climatic conditions such as wind and variations in humidity and temperature. A dry wind will bring lemons to yellow, or tree ripe color, before their time and has a tendency to shorten their life expectancy.

IV.

Lemons are stored in loose boxes. They are shipped in packing boxes of standard sizes, the number of lemons in packed boxes varying according to their size. Four hundred six of such packed boxes constitute a standard railroad car shipment.

Lemons are known and referred to in trade as to size by the number of lemons which can be packed in a standard packing box, such as 300's, 360's, etc.

When lemons are being packed for shipment they are removed from the loose boxes and placed upon grading belts. All lemons placed upon such grading belts, which are considered suitable for shipment, are then packed. It is desirable to avoid returning any lemons to [102] storage because re-handling tends to injure the fruit, reduce its marketability and increase the cost of handling. In the process of packing lemons are segregated as to size and grade,

and when a sufficient number of various sizes and grades of marketable lemons are packed, they are placed in cars for shipment. Except in case of shipment by truck, lemons can only practically and economically be shipped in less than carload lots when shipped with other citrus fruits. It is a common practice in the industry to ship lemons in cars with oranges and grapefruit.

V.

Lemons shipped in Interstate Commerce are sold either at private sale f.o.b. packing house, or on a price arrival basis or at auction. There are 10 auction markets outside of and 1 in California. The defendant Cahill-Battaglia deals only in lemons and it is impractical for this particular dealer to ship lemons in less than carload lots or to pack lemons in contemplation of shipment in less than carload lots except where shipments are to be made by truck.

VI.

Defendants LaVerne Co-Operate Citrus Association, Glendora Co-Operative Citrus Association, Ventura County Orange and Lemon Association, Whittier Mutual Orange and Lemon Association, Index Mutual Association and Chula Vista Mutual Lemon Association market their lemons through Mutual Orange Distributors, which is a co-operative marketing corporation organized under the laws of California. Mutual Orange Distributors (hereinafter referred to as "M.O.D.") has been marketing lemons and other citrus fruits for its member asso-

ciations for many years, including said defendants. M.O.D. markets for about 700 lemon orchards. Its shipments of lemons in Interstate Commerce average approximately 1,000 cars a year, included in which are the lemons shipped on behalf of the above named defendants. Approximately 75% of the lemons handled by M.O.D. and its member houses, including the defendants above named, are sold and [103] shipped for consumption in states other than California and Arizona. It maintains agents in every carload market in the United States and Canada. While it has some salaried agents, it operates chiefly through brokers. Sales are negotiated by such agents and brokers, contracts of purchase and sale being signed in the states of delivery and shipments made from California. Practically all such sales are made subject to determination of price at the market quotations at the time and place of delivery to the purchaser. M.O.D. sales for its member houses, including defendants above named and the member houses, shipped about 50% of the lemons sold by M.O.D. direct to one buyer which maintains its own retail outlets and which plans its orders for normal requirements weeks and sometimes months in advance. This one large buyer also buys large quantities of lemons from other shippers. Practically all of its purchases from M.O.D. and others are on the basis of price on arrival.

VII.

Following the purported effective date of said Order, an Administrative Committee, as provided

for therein, was appointed by the Secretary, which committee thereafter recommended to the Secretary volume regulation of shipments as provided in said Order. Thereupon the Secretary, pursuant to recommendations of said Committee, fixed the total quantity of lemons which might be handled in the current of interstate commerce for the weekly period beginning 12:01 A.M. June 1, 1941, to 12:01 A.M. June 8, 1941, at 263,900 packed boxes, and the allotment of defendant Glendora Co-Operative Citrus Association at 288 packed boxes, computed on a prorate base of .109% of such total quantity; and the allotment of defendant Chula Vista Mutual Lemon Association at 2673 packed boxes computed on a prorate base of 1.013% of such total quantity; and the allotment of defendant Ventura County Orange and Lemon Association at 3251 packed boxes computed on a prorate base of 1.232% of such total quantity; and the allotment of LaVerne Co-Operative Citrus Association at 3557 packed [104] boxes computed on a prorate base of 1.348% of such total quantity; and the allotment of defendant Upland Orchards, Inc. at 124 packed boxes computed on a prorate base of .047% of such total quantity.

Similarly for the week beginning 12:01 A.M. June 8, 1941, to 12:01 A.M. June 15, 1941, the Secretary fixed the total quantity at 233,450 packed boxes; and the allotment of said defendant Ventura County Orange and Lemon Association at 2876 packed boxes computed on a prorate base of 1.232% of such total quantity which allotment was subsequently adjusted to minus 406 packed boxes for

alleged over-shipments; and the allotment of defendant Orange Belt Fruit Distributors, Inc. at 971 packed boxes of lemons computed on a prorate base of .416% of such total quantity.

Similarly for the week beginning 12:01 A.M. June 15, 1941, to 12:01 A.M. June 22, 1941, the Secretary fixed the total quantity at 233,300 packed boxes, and the allotment of defendant Whittier Mutual Orange and Lemon Association at 389 packed boxes computed on a prorate base of .174 of such total quantity, which was subsequently adjusted to minus 406 packed boxes for alleged over-shipments.

Similarly for the week beginning 12:01 A.M. June 22, 1941, to 12:01 A.M. June 29, 1941, the Secretary fixed the total quantity at 233,450 packed boxes, or 575 cars (on the basis of 406 packed boxes to the car), and the allotment of defendant Index Mutual Association at 713 packed boxes computed on a prorate base of .251 of such total quantity which was subsequently adjusted to minus 51 packed boxes for alleged over-shipments, so that the largest amount of lemons which said defendant Index Mutual Association could ship under the order in the current of Interstate or Foreign Commerce with Canada during said weekly period was 662 packed boxes.

Similarly for the week beginning 12:01 A.M. January 18, 1942, to 12:01 A.M. January 25, 1942, the Secretary fixed the total quantity at 275 car-loads but the Secretary did not fix an allotment for the defendant Western Fruit Growers, Inc., due

to the fact that the said [105] defendant failed to file its application for a prorated base and for allotments prior to the date on which the computation for the above weekly allotment was in order under the applicable provisions of the Order.

VIII.

Not more than approximately 10% of the lemons sold in fresh fruit form throughout the United States and Canada can be sold in the States of California and Arizona. To accommodate their business, both interstate and intrastate, defendants have developed facilities for the packing and shipment of lemons, including packing houses, storage and other facilities, in which large sums of money have been invested. Exception as to the storage capacity of the defendants should be noted in the cases of the defendants as follows: Cahill-Battaglia, Inc. and William P. Pann combined have storage capacity for 1,000 boxes of lemons or approximately two cars. Irving Sarnoff and Abraham Paul have no storage facilities for the storage of lemons.

IX.

If tree ripe and silver lemons are to be shipped before they become unmarketable through decay, they must be shipped sooner after picking than do dark or green lemons.

X.

It is stipulated that Orange Belt Fruit Distributors, Inc., in making its application to the Committee for computation of the lemons available for

current shipment, in compliance with the rules purportedly adopted by such Committee and the Order, did so under protest.

It Is Further Stipulated that all applications and other documents and papers filed by all defendants with the Committee were filed under protest and with express reservation of any rights of said defendants.

The foregoing is subject to all exceptions and objections as to relevency, immateriality and competency, as to the whole or any [106] part thereof.

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United States Attorney

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Assistant U. S. Attorney,

WM. W. WORTHINGTON,

Assistant U. S. Attorney.

By WM. M. WORTHINGTON

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tion and LaVerne Co-Op-
erative Citrus Association
et al.

PETER T. RICE

Attorney for Cahill-Battaglia,
Inc. and William P. Pann

G. V. WEIKERT,

Attorney for Orange Belt
Fruit Distributors, et al.

[Title Court and Said Consolidating Cases.]

STIPULATION OF FACTS.

The California Fruit Growers Exchange handles approximately 90% of the total lemons produced in California and Arizona. It sells a large part of the lemons marketed by it through the auctions. The California Fruit Growers Exchange (hereinafter for convenience referred to as "The Exchange") purports to be a co-operative marketing corporation, marketing for more than 4,000 lemon growers. These growers turn in their fruit to various packing houses, of which they are members, and which prepare it for shipment and ship it. Over 60 packing houses handling lemons are affiliated with the Exchange. These houses are grouped into 25 district exchanges. The Exchange is made up of these district exchanges, with one director from each on the central board. Each district exchange in turn is made up of a group [107] of local associations or packing houses with one director from each local association elected by its board. The directors of each local association are elected by its grower members. The local associations having packing houses

affiliated with The Exchange, including both commercial corporations for profit and co-operative corporations.

Dated; this 30 day of March, 1942.

WM. FLEET PALMER,
United States Attorney,
WALTER M. CAMPBELL,
Assistant U. S. Attorney,
WM. M. WORTHINGTON,
Assistant U. S. Attorney.
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GUY RICHARDS CRUMP,
Attorney for Certain Defen-
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PETER T. RICE
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Fruit Distributors, Inc.

[Endorsed]: Filed March 31, 1942. [108]

PROCEEDINGS AT THE TRIAL.

The trial of the ten consolidated cases started March 31, 1942, before the Honorable Ben Harrison, Judge presiding, whereupon the following proceedings occurred.

At the suggestion of the court, the file in the La Verne Case was referred to and used as a typical example of all the cases on trial. In response to the court's question, Mr. Worthington, Assistant United States Attorney, stated that the complaints in all of the cases were in the same form, except that the numbering of the paragraphs in the La Verne complaint was different from the other complaints.

"The Court: And the special defenses are the same in all cases.

Mr. Crump: The evidence is different in some of the cases, particularly with regard to the Chula Vista case. There is additional evidence in connection with that, because of the large percentage of tree ripe small size lemons handled by that house, which goes to different markets than the large size lemons.

I might say, your Honor, that I have prepared my offers of proof on the understanding, which I gathered from your Honor's ruling on the pre-trial hearing that the actual taking of evidence would not be permitted. I haven't approached the subject solely from the standpoint of any one case; the evidence introduced in one will be largely applicable to others, and I assume it may be stipulated and ordered that the testimony introduced, insofar as one case is concerned, will apply to all, insofar as it is applicable.

The Court: Yes. At our pre-trial conference I ruled that the defendants be held to follow their administrative remedy and that in these actions the court would not receive evidence on the sufficiency of the evidence before the Secretary of Agriculture. As I understand, Judge Crump, under your theory it would be virtually a [109] trial de novo of the questions that were before the Secretary of Agriculture.

Mr. Crump: No, that is not my position. I understand that the cases hold that in the injunction proceedings the court will not go back of the order; that is, will not go into the testimony which was presented to the Secretary of Agriculture, and upon which the order in question, Order No. 53, was based. So we don't intend to go into the economic phase of the case, or any showing prior to the order. We do attack the constitutionality of the order under the fifth amendment, both as the order is written and as it necessarily operates on the grounds that it deprives the defendants whom I represent of their property without due process of law. And, also, we attack it on the ground that it is discriminatory and confiscatory. And the evidence which we wish to offer and which I will attempt to offer, subject to the rulings of the court, but without agreeing to the rulings of the court, goes to those points."

In response to the court's question, Mr. Crump stated for the record that each of the defendants represented by him (viz. all of the appealing defendants herein) had petitioned the Secretary of

Agriculture for a modification of Order No. 53, or exemption therefrom, under the provisions of section 608c (15) of the Act; that these petitions had been denied and petitioners denied any relief by the ruling of the Secretary, of date March 7, 1941; that a joint petition for the review of such ruling of the Secretary had been filed by all of said parties represented by Mr. Crump (viz. defendants, La Verne Co-Operative Citrus Association, a corporation; Glendora Co-Operative Citrus Association, a corporation; Upland Orchards, Inc., a corporation, Ventura County Orange and Lemon Association, a corporation; Whittier Mutual Orange & Lemon Association, a corporation; Index Mutual Association, a corporation; Chula Vista Mutual Lemon Association, a corporation, and also Mutual Orange Distributors, the [110] selling organization for said defendants) in the above entitled court on March 27, 1941, and that these review proceedings were now pending, but undecided, before Honorable Harry A. Hollzer, Judge of said court.

The court then started the consideration of the complaint in the LaVerne Case and proceeded as follows:

“The Court: The case of LaVerne. All of the allegations in the complaint down to paragraph 7. I believe, are admitted.

Mr. Crump: I think so.

The Court: And 7 is admitted, except the allegation “All interested persons, including defendant, were afforded full opportunity to be heard concerning the proposed order.” That is the only denial in that paragraph, isn’t it?

Mr. Crump: I think so.

The Court: Isn't that a matter that is before the Secretary on the petition for review?

Mr. Crump: I think so, but I didn't want to admit it. I couldn't very well admit it.

The Court: So it isn't a point that is involved in this action here.

Mr. Crump: I don't propose to offer any evidence in connection with it.

The Court: Paragraph 8. I have a question mark on that one. As I understand it, you do not deny that the Secretary made the order?

Mr. Crump: No.

The Court: What is the effect of your denial in Paragraph 8?

Mr. Crump: Well, the effect of it is to deny that the order was based on the evidence taken at the hearing, or that the Secretary found from the evidence on the hearing that the order should be made. In other words—— [111]

The Court: To preserve any right you had under the pending hearing?

Mr. Crump: That is right. That is the effect of it, is to protect the record.

The Court: Then, Paragraph 9. The only part of that which is denied is, "the parties signatory to which were handlers who handled more than eighty per cent. (80 per cent) of the volume of lemons covered by the order.

Mr. Crump: Yes.

The Court: What point is involved in that?

Mr. Crump: The point involved in that is that

the Government evidently thinks that is a deep dark secret, and they won't let us know who signed it; so we can't admit it.

Mr. Worthington: I think Judge Crump is going to admit, if the court please, that among others who signed the agreement was California Fruit Exchange.

Mr. Crump: I will admit that the California Fruit Exchange signed it, but I won't admit that any of the member houses signed it.

The Court: What is your position, as far as the recitals of the Secretary of Agriculture in his order? Do you think that is binding upon us, as far as this section is concerned?

Mr. Crump: I don't think we can go behind the order in this action.

The Court: All right."

It was then stipulated by all the parties that California Fruit Growers Exchange was one of the signers of the Marketing Agreement.

"The Court: Then, as far as Paragraph 10 is concerned, do I understand the only effect of the denial there is that, "and selected the members thereof in accordance with the provisions of said section of the Order, and the said committee is now and has at all times since the establishment thereof exercised the powers and performed the duties [112] given and required by the Order," which is more or less of a conclusion?

Mr. Crump: I think so.

The Court: How about Paragraph 11?

Mr. Worthington: That is admitted, I think, if your Honor please, as to all of the defendants except Cahill insofar as filing for the prorated allotment is concerned. Cahill didn't file for the prorated allotment at all."

"The Court: Your stipulation is that they filed under protest, is it not?

Mr. Crump: That is my understanding.

The Court: Paragraph 12 is another denial of a conclusion of law.

Mr. Crump: That is right.

The Court: Paragraph 13 is admitted. 14 is denied.

Mr. Worthington: Is the court referring simply to the defendants represented by Judge Crump?

The Court: I am thinking first of the case involving the LaVerne Co-Operative Association.

Mr. Worthington: Paragraph 14; is that the one?

The Court: Yes, 14.

Mr. Worthington: I think that is covered by the stipulation.

The Court: I know, but I want to know just what is the effect of your allegation.

Mr. Crump: I think it is largely a matter of conclusions of law. In other words, we admit in these answers over-shipments; that is, shipments beyond the allotments fixed by the Secretary and the Committee.

The Court: Yes.

Mr. Crump: We deny that those over-shipments were unlawful. [113]

Mr. Worthington: But, I take it, the defendant does not deny that the Secretary fixed allotments?

Mr. Crump: No.

The Court: But I understand they recognized—what is it, Order 53?

Mr. Worthington: Yes, sir.

Mr. Crump: Pardon?

The Court: You recognize the Order 53. And the only thing you are denying is the basis upon which the Order was made; that is, the legality of it?

Mr. Crump: Yes, we recognize that there is an Order No. 53.

The Court: Yes.

Mr. Crump: And we recognize that the acts of the Committee and the Secretary were in pursuance to the provisions of that Order.

The Court: Yes. Take Paragraph 16, for instance, which sets forth the number of boxes shipped in violation. That is denied. I understand it admits an over-shipment, but is there a dispute as to the figures involved?"

It was then stipulated by the Assistant U. S. Attorney, Mr. Worthington and Mr. Crump and accepted by the Court that, for the purposes of this hearing only, the amounts of lemons stated in the respective answers of the defendants represented by Mr. Crump as having been over-shipments in the weekly regulation periods set forth in the complaints were true and correct.

"The Court: Do I understand you gentlemen

that as to Paragraph 17 the stipulation covers the exact amount of allotment that was granted to the Glendora Co-Operative?

Mr. Crump: I think the stipulation covers the total amounts of shipments permitted, and the allotments for each one of the defendants for the period covered by the allegations of the complaint. That is right, isn't it, Mr. Worthington? [114]

Mr. Worthington: That is correct.

Mr. Crump: It does not cover the subsequent weeks, which we cover in our——

The Court: In your answer?

Mr. Crump: In our affirmative answer.

The Court: As I understand it, according to the stipulation it is stipulated that while you do not admit the right to make the allotments, that the allotments were made, and that there were shipments in excess of the allotments.

Mr. Crump: Yes. We admit, and I will stipulate that each one of the defendants whom I represent for one or more weeks shipped lemons in excess of the amount of their respective allotments. Does that cover it, your Honor?

The Court: I think so.

Mr. Crump: Yes.

The Court: Now, you also cover in your stipulation, commencing with Paragraphs 23 and 24—you also set forth long recitals of the general marketing of lemons. May I ask what materiality that has in this action? Aren't they matters that are presently before the Secretary of Agriculture?

Mr. Crump: Are you referring now to the allegations of the complaint?

The Court: Yes. For instance, 23 and 24.

Mr. Crump: Well, I didn't draw the complaint. I think Mr. Worthington can answer that.

The Court: Take 23. It is admitted as to certain parts and denied as to certain parts. Wherein is that a material allegation as to any of the issues in the complaint?

Mr. Worthington: May it please the Court, I don't think that it is material, especially at this time, in view of the rulings of the court in the pre-trial conference.

The Court: Well, of course, I may be wrong in some of my rulings. It won't be the first time. I am trying to get the [115] theory upon which you approach this subject.

Mr. Crump: Well, we consider it material from the standpoint of the defendants, but I don't know that it has any materiality from the standpoint of the Government's case. It is probably largely a matter of inducement.

The Court: It may be informative, but I am inclined to the position that the only material allegations of the complaint are that there has been an order made, for instance, this Order 53, and that there has been a committee appointed, that the committee has made certain allotments, and that the defendants have shipped in excess of those allotments, insofar as the Government's case is concerned. I am asking, gentlemen, frankly, for any light you can throw upon it.

Mr. Worthington: I agree with the court fully, as far as I am personally concerned, that it is surplusage. And that all that is necessary to protect ourselves—we might intend offering the transcripts before the Secretary, but I think we have very good authority that it isn't necessary. Certainly the Government wants to protect itself at all angles, and, of course, the complaint drawn in this form is one that has been used by the Government for some little time in this particular type of cases, because that had been heretofore presented to the lower courts, as fully as possible—the Government's reasoning, as well as its final action.

The Court: I know, but if this is a proper allegation in the complaint, before you can obtain injunctive relief then the court must try the very issues that were before the Secretary of Agriculture.

Mr. Worthington: I don't think it is necessary. I don't think it is part of the Plaintiff's case, at all, except as rebuttal later on, if the defendant puts in a defense along those lines. In other words, as I read the complaint it is somewhat setting out rebuttal instead of the plaintiff's cause of action.

Mr. Crump: I don't want to stipulate on being understood as agreeing that the Government need only prove the making of the [116] order, and the violation of the orders of the Committee and Secretary, with reference to the amount of shipments. And what I am saying is intended, rather, to be an expression of my views based upon what I under-

stand the Government's contention is, and what I understood was your Honor's ruling on the pre-trial conference. If I understand the Government's position correctly it is that it only has to show that the Order was made, and that it was violated. Is that your position, Mr. Worthington?

Mr. Worthington: That is my position, but I am also going to take advantage of making an offer of the transcript before the Secretary of Agriculture, to the court, in order to protect myself in the event we later decide that the dissenting judges in the Rowan Oil case didn't construe the meaning of that case correctly.

The Court: Well, you must understand this: If the court is wrong this case is going to be sent back for a re-trial, and if those are material facts in the case they will have to be threshed out.

Mr. Crump: I just want the record to show that while I have made certain statements here, in regard to certain allegations, that they are not an expression of my own view, but an expression of what I would consider to be the case if Mr. Worthington's position is correct.

The Court: Well, the court will pass on that question, as far as this case is concerned, and then, as I understand it, gentlemen, any evidence introduced here or offered in evidence, is binding upon all the parties to these ten actions, and that in addition thereto, Mr. Rice will offer additional evidence on points raised by him, which is different from the various cooperative associations that are [117] represented by Judge Crump and Mr. Weikert.

Mr. Rice: We have stipulated to those differences, your Honor, as affects the second handlers.

Mr. Crump: We will stipulate that all evidence introduced in any one of the consolidated cases may be considered as applying to all of the cases, insofar as it is applicable.

Mr. Rice: So stipulated.

Mr. Crump: And that the same will be true of any offers of proof which have been made.

Mr. Rice: So stipulated, counsel.

Mr. Weikert: So stipulated.

Mr. Worthington: So stipulated."

"The Court: Judge Crump, may I make an observation as to the case pending to review a decision of the Secretary of Agriculture? Will not that proceeding settle all the issues that are involved in this case?

Mr. Crump: We hope so.

The Court: The constitutionality questions and the sufficiency of the evidence before the Secretary of Agriculture, and your question that you were shut off on cross-examination, all those things will be determined in that proceeding.

Mr. Crump: We hope so, your Honor. But I don't want to fall to the ground between two stools. And to illustrate what I mean, and not to be considered, of course, as an offer of evidence at all: In the first hearing before the Secretary of Agriculture we were not permitted to cross examine witnesses. On the second hearing the Secretary took the position that we couldn't go back of the order to show that the order was not based on sufficient

evidence. Consequently, we lost out both ways. We lost out in the first hearing because we weren't permitted to cross examine and to show that the facts were not so, and we lost out on the second hearing because the court said we couldn't go back that far; we had to start in at the time of the [118] making of the orders.

Now, using that as an analogy, I don't want to be put in a position here of having a ruling in these cases, which we might acquiesce in, to the effect that all complaints are to be determined in a review hearing, and then get into the review hearing and have the court there say they should have been determined in the injunction hearing. So, as far as I am concerned, we are in this position: We have got to fight both these things through until one is finally decided, or that one be abated until the other one is decided.

The Court: Well, the thought I had in mind—and I am simply expressing my thoughts out loud so that you can understand what is in my mind—I am sure you must pursue your administrative remedy and that under the act here this court is primarily concerned with whether or not the Order No. 53 has been violated; that the question, in matters of review, should be relegated to the other actions, and unless something is shown to the contrary I am going to rule that way. On the other hand, I do not desire that there be any ruling or findings of fact in this case that will in any wise preclude a proper hearing on the matter of review. In other words, I am trying to confine the issues

down to a point so that your matters on review in this proceeding will in no wise be considered res adjudicata in any of the issues there involved.

Mr. Crump: Here is one thing that bothers me in that connection; I don't think the procedure has been entirely settled in these matters between reviewing the injunction cases or the extent of the review. As far as I can decide from the cases some courts have held, and probably the majority have held, that you are limited on your review to the testimony that was taken before the Secretary of Agriculture, except on constitutional questions. Some courts, however, seem to treat that review as a quasi trial de novo, in which evidence could be received rebutting evidence taken before the Secretary of Agriculture. And we are more or less feeling our way in that respect. If it should be ultimately held that in the review proceedings we are limited entirely to the evidence taken before the Secretary of Agriculture, including any constitutional points which we raise, then evidence showing the operation of the orders and its necessary effect, as operative, insofar as it is discriminatory or confiscatory, would not be before the court in the review hearing. Hence, the only place where it could be presented would be in the injunction hearing. Now, on the other hand, if it should ultimately be held that we have a right to go at least to the extent of putting in evidence in the review hearing to show that the anticipated injury to those whom we represent has become, in fact, an actual injury—of course, the testimony on the original

hearing before the Secretary had to be more or less opinion evidence as to what the effect of the order would be, because it wasn't then in effect, and it wasn't in evidence; whereas, now we know what the effect of it has been.

Now, query: In the review hearing will the court go into the question as to what the effect of the order actually has been, insofar as it may have deprived the handlers or any handlers of their property without due process of law? If it will not, and we have a right to raise the constitutionality question, and we can't raise it there, certainly we can raise it here, because we must be able to raise it one place or the other. So I don't see now any way out of it except either to proceed here as though there were no review, except as to matters previous to the making of the order itself, on the one hand, or else that this trial be continued indefinitely, or continued until after a decision in the review cases; and that the temporary injunction or temporary restraining order remain in effect in the meanwhile, which give the Government full protection, and protects us from any adverse findings which would necessitate an appeal. I can't see how the Government would suffer at all if that were done; [120] and perhaps that is the best thing to do, to let the review proceeding take its course, and let us stipulate, as we have from time to time prior to this trial that the temporary restraining order may remain in effect without prejudice; that is, I mean without any prejudice to us by reason of their

not moving to set it aside or by reason of any delay to which we consent.

I think that, perhaps, is the best answer to the whole problem.

The Court: Well, the court wants to dispose of these cases. They are injunctive proceedings, and I think the court should dispose of the issues in these cases. But at the same time, as I told you before, Judge Crump, I do not desire to make any rulings or findings of fact that would in any manner jeopardize a hearing that you have coming up in another court in this district.

Mr. Crump: Well, if your Honor adopts the procedure outlined in the pre-trial conference of not taking evidence, but permitting offers of proof, then I take it there would be no findings, except the findings on the portions of the complaint which are admitted, and which, in effect, amount to a finding, that the order was made, that the shipments were limited in certain amounts, that over-shipments were made contrary to the allotments; leaving all questions of legality of the making of the order, and any legal conclusions alleged in the complaint to the effect that the Secretary found on sufficient evidence, and so forth—which I don't think there is any question here—to be determined in the review actions.

The Court: That is the reason I have been asking some questions here. We are getting down to the gist of what the court has in mind. For instance, in reading this complaint I felt there were

a lot of allegations that were superfluous and represent more or less conclusions of law. For instance, that they did certain things and that it was according to law. That is a conclusion as far as the pleadings are concerned. [121]

Mr. Crump: I wouldn't like a finding that the Secretary found from the evidence before him certain things, because that would mean if we had to try that out here we would have to go into the evidence taken before him.

The Court: I think, insofar as this action is concerned, the finding should be that an order was made and that in pursuance to that order certain committees were appointed and certain allotments were made, and there were overshipments. For instance, this paragraph—I forget the number—making a recital of certain order regulating the handling in the lemon industry, that is a matter that the Secretary of Agriculture has passed on. If I am to pass on it in this action it opens a trial *de novo* on the issue.

Mr. Crump: Not at all. We have a right to put in evidence here and make our offers of proof on the basis of good faith, but, nevertheless, having in mind that the court has stated in the pre-trial conference that when the question arose it would not take evidence, and that we would be limited, as I understand, to show, if we could, that the order on its face was invalid, without helping that in any way by evidence extrinsic under the order; then merely discussing the procedure without waiving

any rights by so doing. It seems to me that the procedure outlined by your Honor would cover the situation, and still preserve our rights in the review, without finding against us on points which really have no place in this case, as I see it, under the theory adopted by the Government.

Mr. Worthington: May it please the court, in answering Judge Crump's argument, I submit that this court is a statutory court. It is not a constitutional court. Its right to decide constitutional questions are those given to it by Congress. Congress can subsequently limit, in specific instances, the right of this court to try constitutional questions. And I submit, in this particular one Congress has in fact placed a limitation on the district courts, where an action is brought by the Government for violation of [122] this particular statute, from going into that constitutional question. And the remedy in these cases is to proceed before the Secretary of Agriculture, and on denial they can go to the district court for review.

The Court: I don't see where you and Judge Crump are apart at all.

Mr. Crump: Well, we are apart on this proposition: That this court has no right to go into constitutional questions. I don't say that for a minute. I think that inherent and embraced in the act itself is a valid order, in order that injunction may issue. But I was talking about procedure. Assuming that the court adhered to the procedure as outlined on the——

The Court: Do I understand, Mr. Worthington, that this court has the right to go into the question as to whether the order of the Secretary is a proper order, unless it complies with an act of Congress?

Mr. Worthington: Using the term "this court" advisedly. That is, this court is sitting simply to hear and determine proceedings brought by the Government to restrain violation of the order; yes, sir.

The Court: I would like to have your authorities on that. As I understand, if there is an act of Congress in dispute, the court still can pass upon it, but the appeal is directly to the Supreme Court. In questions of constitutionality in the state law they call in two extra judges. But you mean to say that I must accept any order that the Secretary of Agriculture puts out, and say that notwithstanding if it is made in a conflict with the statute which provides for it on the face of it, I still have to accept it?

Mr. Worthington: We first——

The Court: I am asking that question.

Mr. Worthington: Yes, sir, your Honor, when the case before you is nothing else than a petition of the Government for a re- [123] straining order and a violation of that order.

The Court: Where is your authority?

Mr. Worthington: There is no authority for it.

The Court: Then, on what do you base that?

Mr. Worthington: On the authority that this court is a statutory court; that the court has no

right to try constitutional questions, except that Congress has given it that right. But it comes now with a special right in a particular instance. It has provided a separate tribunal, and that is before the Secretary of Agriculture, where the parties think they have been injured by the action of the Secretary, pursuant to an act of Congress, can proceed and their entire rights may be heard and determined before the Secretary of Agriculture. And if the Secretary of Agriculture goes against them they have a right to go into the district court and have all questions of law determined by the district court. The action that we are proceeding under is separate and distinct entirely. It simply provides protection to the Government. Otherwise, to grant Judge Crump's contention would be that the defendants could go ahead and violate the statute without paying any attention to it whatever, and when the Government attempted to stop them they could come in and plead the Government's action against them contrary to what the statute has provided. They wouldn't have to proceed at all. Congress has provided a definite method of procedure for them.

The Court: Well, you proceed with your case. What evidence have you to offer? Have you got any evidence to support it?

Mr. Worthington: Not as far as counsel's statement is concerned, but I would like to offer a transcript before the Secretary of Agriculture—

Mr. Crump: Will you pardon me a moment?

Mr. Worthington: Yes.

Mr. Crump: Just one word with respect to this argument of Mr. Worthington: Here again we are faced with this difficulty of [124] having adverse ruling, and according to Mr. Worthington the constitutional questions must be presented to the Secretary of Agriculture, which means that the Secretary, according to the Government's argument, is vested with the authority to determine whether his own acts are constitutional. That goes way beyond what the Secretary of Agriculture says himself, because in the hearing before the Secretary of Agriculture he ruled that all constitutional questions was for the court and not for the Secretary. Now, if the Secretary ruled that the court must do it, and the Government says that the Secretary must do it, and neither one of them does it, then we can't have any ruling on constitutional questions at all.

Mr. Worthington: I don't think the court got from my statement that the Secretary would pass on the constitutional questions.

The Court: Who would pass on it?

Mr. Worthington: The United States District Court would pass on it in the review proceedings. I am not for one moment suggesting that the Secretary of Agriculture rule on constitutional questions.

The Court: Go ahead and proceed with your case. As I understand, you are now offering the proceedings before the Secretary of Agriculture.

Mr. Worthington: One volume stamped on the

outside A-144 O-144, and one volume stamped L-C, 2-A and 2-B, being a certified transcript of a record of the proceedings under which the hearing was called to determine whether or not an order was to be issued, now before the court and known as Order No. 53, being a complete transcript of the hearing before the Secretary of Agriculture in that matter——

Mr. Crump: May I see that. This is, Mr. Worthington, just the proceedings on the promulgation hearing.

Mr. Worthing: ——containing statistical data on California and Arizona lemons, statistical information in the lemon industry, statistics pertaining to lemons—— [125]

The Court: You don't have to read all the contents of that. It is a transcript of record before the Secretary of Agriculture upon which you base Order No. 53 involved in this action. It may be marked. The court is going to try to be consistent in this matter, and simply mark it for identification. It feels it isn't part of the issues of this case.

Mr. Crump: In other words, the offer in evidence is denied.

The Court: Yes.

The Clerk: Exhibit 1.

(The documents referred to were marked "Government's Exhibit No. 1 for identification.")

Mr. Worthington: That is the Government's case, may it please the court.

The Court: Now, we will hear from you gentlemen. Do you want a recess?"

A short recess was then taken.

Mr. Crump: Now, as to the question of procedure, your Honor: I have witnesses here, and I could call them to the stand and ask preliminary questions which I assume would be admissible under the order, and then proceed to ask a question to which an objection, I assume, will be interposed and the court's ruling given; or we can have a stipulation it need not be necessary to call the witnesses to the stand, that I may proceed to make my offers of proof the same as though they had been called, objections interposed and objections sustained. Is that satisfactory?

Mr. Worthington: I think that is a matter entirely in the court's discretion.

The Court: It seems to me that inasmuch as the court at the pre-trial conference, of which there is no record at this time, as far as the files are concerned, held that the defendants would have to pursue their administrative remedy and that the court was not going to [126] receive evidence as set forth in the special defenses here, that an offer of proof should be sufficient without the necessity of calling the witnesses to the stand. However, the court is very much interested in these offers of proof, and if the court should, during the proceeding, determine that it desires to hear certain evidence, then I will so indicate to counsel, and such witnesses may be placed on the stand.

Mr. Crump: Very well. Is that satisfactory?

Mr. Worthington: Oh, yes.

Mr. Crump: Very well.

The Court: However, in making the offers of proof, Judge Crump, I wish you would state the purpose for which you make the offer, so that the court will be able to determine——

Mr. Crump: Well, each and all of the offers of proof which are made will be for the purpose of establishing the unconstitutionality of the order, both as written—that is, as it necessarily operates, and on its face.

The Court: That is, the workings of the order. The evidence is offered for the purpose of showing the workings of the order, insofar as it affects the various defendants here?

Mr. Crump: That is correct.

The Court: You may proceed.

J. A. STEWARD

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: J. A. Steward.

The Court: May I suggest that you ask leading questions.

Mr. Crump: Yes.

(Testimony of J. A. Steward.)

Direct Examination

By Mr. Crump:

Q. Mr. Steward, where do you live? [127]

A. Redlands, California.

Q. And you are connected with the Mutual Orange Distributors? A. I am.

Q. What capacity? A. Sales manager.

Q. How long have you been engaged in that occupation? A. 21 years as sales manager.

Q. Mutual Orange Distributors was organized when? A. 1906.

Q. It is a sales organization, that is, a general marketing organization handling oranges, lemons and grapefruit in the states of California and Arizona? A. Yes.

Mr. Worthington: I object to that as incompetent, irrelevant and immaterial.

The Court: That is a preliminary question.

Q. There are 11 associations at present for which it handles lemons, all but one of which are located in California? A. Yes.

Q. And all of the California associations are cooperatives; that is, nonprofit cooperative associations? A. Correct.

Q. Chula Vista Mutual Lemon Association, Glendora Cooperative Citrus Association, Index Mutual Association, La Verne Cooperative Citrus Association, Ventura County Orange and Lemon Association and Whittier Mutual Orange and Lemon

(Testimony of J. A. Steward.)

Association are affiliated with Mutual Orange Distributors?

A. Yes, they are members of it.

Q. And Upland Orchards, until it went out of business? A. Yes, sir.

Q. When did it go out of business? [128]

A. Last summer. I don't know the exact date.

Q. After the prorate went into effect?

A. Yes, after the prorate went into effect.

Mr. Crump: Now, I will ask questions not of a preliminary nature, and I assume they will be objected to, and that the court will sustain the objection, so that I will proceed with the offer of proof.

Mr. Worthington: May I ask the court to consider that each of the questions——

The Court: Let me ask you, what you expect to prove by this witness.

Mr. Crump: I expect to prove by this witness the method of operation of the Mutual Orange Distributors, as the agency of these defendants, and the operations before and after the prorate order went into effect, for the purpose of showing the effect that the order had on the order of the business of the defendants.

The Court: Well, the court will hold that such evidence is immaterial; and if you desire to amplify your offer, it seems to me that it should not be necessary to go into detail as to what you expect to prove.

Mr. Crump: Well, if your Honor please, I re-

(Testimony of J. A. Steward.)

spectfully request permission to do so, in order that this court might get this picture as to what the offer of proof—

The Court: It will be easier to listen to it than argue.

Mr. Crump: All right. Then, I offer to prove by this witness the following facts:

“The policy of Mutual Orange Distributors (which will be referred to for convenience as ‘M.O.D.’) is to endeavor to sell all of the fruit that is offered to it, to the best advantage. Over many years it has developed a market for its products through private sale, rather than through auctions, although there are some sales made [129] at public auction. About 90 to 95 per cent of its lemon sales are interstate, and about 95 per cent of the interstate sales are made at private sale, about 75 per cent being made on direct orders. Four or five per cent of the interstate sales are made through the auctions, but this amount was getting less and less each year until Order No. 53 became effective, June 1, 1941.

“About 25 per cent of the interstate sales are made without orders, those not sold at auction being rolled, that is to say, shipped to a destination where it is anticipated the market will purchase the fruit upon its arrival.

“M.O.D. sells through auction only as a last resort. That is to say, there are certain cars

(Testimony of J. A. Steward.)

that cannot be sold at private sale at prices which the organization thinks should be received for them, sometimes because the sizes do not suit the regular buyers, or because the lemons have arrived at the markets in a condition showing some percentage of decay, necessitating quick disposal.

“In the final analysis the price paid for lemons is the price which the consumer is willing to pay; but so far as the trade is concerned—that is, the trade that buys lemons in wholesale carlots—the price being realized at the auction terminals more or less fixes the price obtainable for lemons in private sale markets. Private sales are not published to the trade, and there is no way in which the trade or competitors can know what prices are obtained at private sale. Private sale prices are not always exactly the same as auction prices, but if the price in the auction market is continuously downward for a few days, the private sale buyer will [130] consider the market weak, and therefore offers less, and vice versa if the prices are advancing in the auctions. Sales are sometimes made privately at a price above the auction prices, and sometimes at a lower price, but it is not the practice of M.O.D. to sell at private sale at less than the auction prices. The only time that would happen would be when in our judgment

(Testimony of J. A. Steward.)

as to market conditions, that is, the supply and demand as a whole, we decided that the market is weak and the auction prices are fictitiously high compared to the general demand throughout the country. Then we may reduce our private sale quotations a little below the then prevailing auction prices.

“When M.O.D. was first organized, in 1906, it started business as an orange marketing organization. There may then have been a few growers who had oranges and also had lemons and sold the lemons through M.O.D., but our lemon tonnage did not really start to develop until about 20 or 25 years ago. At that time it was generally understood in the trade that California Fruit Growers Exchange was handling about 98 per cent of the lemons produced in the country.

“The lemon business of M.O.D. developed in this way: As our orange business increased, that is, as our volume of oranges increased, and we built up a reputation for oranges under our ‘Pure Gold’ trademark, our orange customers demanded lemons from us under the same trademark. That development began about 1925 or 1926. Then we undertook to get more lemons in our organization, but made no particular solicitation of growers for a few years, until we had made arrangements with Great Atlantic & Pacific Tea Company, which I be-

(Testimony of J. A. Steward.)

lieve [131] was in 1927, to buy our oranges almost exclusively. In other words, they were to buy from us all that we could supply for their requirements. At that time they requested us to increase our lemon tonnage, because they also wanted to have our lemons. Since then our lemon tonnage has grown until this year we are handling about 8 per cent of the total shipments.

“M.O.D. receives standing orders for lemons, by which I mean that a customer will place an order with us at a certain time, requesting that we ship it regular supplies of lemons—say one, two or three cars a week, whatever their minimum requirements may be. In addition to these orders, as the season progresses and the demand increases, as it usually does, the customer will place individual orders for an extra car or two to be shipped. We have a limited number of standing orders that run throughout the twelve months, but the greater number are placed with us in the spring of the year for lemons to be supplied throughout the months of June, July and August.

“When orders are received, it is our practice to investigate through our associations as to the supply of lemons they have and anticipate they will have as the season goes along, and as to the sizes they estimate will be available. We offer the orders to the associations that are in position to fill them.

(Testimony of J. A. Steward.)

“Standing orders usually are placed with the larger associations that have the larger volume of lemons each week to ship, such as Ventura County Orange & Lemon Association and La-Verne Cooperative Citrus Association. Some of the smaller houses receive some of these standing orders through what we call a pooling system. We place the order with one of the salesmen in our office, [132] who contacts, daily or oftener, these small associations and assembles the lemons from the different houses into carloads that may fit such orders. Those particular orders would not be placed with any packing house in writing, but would be handled as a pool car.

“We have a large house at Chula Vista, known as Chula Vista Mutual Lemon Association, but the demand for its lemons being mostly in the southern market, it usually has all the regular orders it can take care of, which makes it unnecessary for us to apportion the standing orders to it. This association has built up over a period of years a business for its brand of small size lemons in the southern states, that part of the country taking that size of lemons to a greater extent than northern states. The lemons grown in the district serviced by Chula Vista Mutual Lemon Association do not keep as long in storage as lemons grown in other districts, and as the

(Testimony of J. A. Steward.)

demand for this type or size of lemons develops in the southern states much earlier in the year than the heavy demand for lemons in the northern states, it is necessary for this association to dispose of the greater percentage of its crop over a shorter period of time than is the case, for instance, with associations handling lemons grown in Ventura County.

“We call the managers of our associations and ask whether we can get the orders which we have on hand filled. If none of them can fill the orders, naturally we have to advise the buyer that we have not the lemons available, or cannot ship them for some restricted reason. We frequently receive orders for a particular brand of lemons, that is, lemons handled by a particular association shipping under its own brand name as well as [133] under our trade name. Our trade name for first grade or fancy lemons is ‘Pure Gold’, and for second grade or choice lemons is ‘Silver Seal’. We do not ship third grade or standard lemons.

“Lemons are picked to size, and when shipped are shipped in standard boxes, there being 406 of these boxes to a carload.

“Lemons are referred to in the trade according to the number which will pack into a standard box; for instance, if 300 lemons will pack into a standard box they are known as 300’s. The sizes run as follows: 180’s, 210’s, 240’s,

(Testimony of J. A. Steward.)

252's, 300's, 360's, 432's, 442's, 490's, 588's, and 640's. The heaviest demand is for 300's and 360's, but in the southern states, where the demand for small sizes is heavier than it is in the northern states, the trade will buy straight cars of 432's to 640's.

"In the operation of M.O.D. and its member associations the quantity of lemons to be shipped is determined chiefly by the regular customers. They require a certain amount of lemons to be shipped, and if we have them, that is the program we follow in trying to take care of our business.

"Prior to the time Order No. 53 went into effect, M.O.D. was able to sell and ship substantially all of its marketable fruit. As a matter of policy, however, it made a practice of eliminating from fresh fruit channels all except its first and second grade fruit.

"Billings and routings on interstate sales are handled through the sales department of M.O.D. To illustrate: An employee of a packing house telephones the sales department of M.O.D. that that house has one or [134] more cars ready to ship, and the sales department of M.O.D. gives it a destination, unless there is a standing order or written order on file with the packing house which specifies the point to which the car or cars are to be shipped, in which event the house has already received its

(Testimony of J. A. Steward.)

instructions and there would no necessity for its telephoning.

“Under our contract with our member associations each association has the right to designate where its cars are to go, but as a matter of practice it is left entirely to the sales department of M.O.D.

“There is no competition between M.O.D. houses so far as interstate sales are concerned, but there is a competition between handlers in interstate commerce, that is, between marketing organizations rather than between handlers in each organization.

“In my opinion it is unnecessary to have a prorate program, such as the one set forth in Order No. 53, at the present time, in order to secure a stabilized movement of lemons.

“Lemons are controlled by very few shippers. Outside of the California Fruit Growers Exchange and M.O.D., there is only about 3 or 4 per cent of the lemons handled by other shippers. I cannot see how the small percentage outside of the California Fruit Growers Exchange could have any effect on the market.

“Inasmuch as our lemons are distributed in about 160 markets, on the average, throughout the United States and Canada, and are spread over a twelve-month period, and we undertake to ship our lemons at the time the customers want them, and sell nearly all of our lemons

(Testimony of J. A. Steward.)

at private sale, there is nothing in our operations which [135] would interfere with anybody else, or that would cause any excess shipments at any particular time.

“Lemons will keep in storage only for a limited time. Some become tree-ripe on the tree; that lemon is considered a weaker lemon and won't hold in storage more than two to four weeks. Then there is the silver lemon, which reaches size and can be picked when it becomes silver, not when green. This type of lemon in some districts may be weaker than silvers grown in other districts, and this will vary from season to season. Silver lemons will hold a little longer than tree-ripes. Then there are light greens, which will hold a little longer than silvers, and the dark greens which will hold anywhere from four to six months in storage.

“When we have no restriction on the time we can move lemons, we naturally give consideration to the lemon that needs to be moved even though the demand, that is, the market price, is not as good as we anticipate we will be able to get if those lemons could be shipped later. Nevertheless, it is better business to ship and sell those lemons in their prime condition, even though less is obtained for them. The growers will thus make more money, or at least lose less money than they would if instead

(Testimony of J. A. Steward.)

of shipping these lemons they were sent to by-products.

“Order No. 53 limiting our shipments of lemons has resulted in our having to keep lemons back, that is in storage, beyond the point where they were in good condition for shipment, which in turn resulted in our having to ship inferior keeping quality of lemons. Lemons of this type do not give consumer or trade satisfaction, and the result is a substantial reduction in the price received by growers. The trade loses confidence in any [136] brand of lemons which does not arrive in the market in prime condition. To explain what I mean: Lemons may arrive in the market in fairly sound condition; when the jobber buys them they appear to be good-keeping lemons, but by the time he disposes of them they may have developed 5, 10, 15 or 20% shrinkage, and when a jobber buys lemons which on the surface appear to be sound, but the life of which is in fact about exhausted, he takes a loss when he disposes of them. This necessarily results in a loss of confidence on the part of the trade, reduces the trade demand, produces dissatisfaction with the retailer and ultimate consumer, and substantially reduces the returns to the growers, not only by reason of the prices offered for lemons being reduced, but because consumers will not buy unless they have con-

(Testimony of J. A. Steward.)

fidence in the quality of the fruit offered for sale.

“The absence of regulation of marketing of lemons has not adversely affected the movement of lemons in interstate or foreign commerce by causing excessive or untimely movement of such fruits to market in the United States or Canada. There have been fluctuations in the price at which lemons are sold by handlers and the price paid to growers thereof from time to time, but these fluctuations were no greater before Order No. 53 became effective than they have been since. There is no connection between the fluctuation in the price of lemons and the regulation of marketing by proration.”

We now offer in evidence a circular letter dated November 19, 1941, being a letter addressed to all handlers of lemons, from the Lemon Administrative Committee, by R. L. MacRae, Assistant Secretary.

Mr. Crump then stated that he had a number of exhibits to [137] use in connection with the offers of proof. Said letter, dated November 19, 1941 was marked defendant's Exhibit “A” for identification.

Mr. Crump: May it be understood that it is not necessary for us to lay the foundation, since the court is ruling that it isn't material, in connection with these exhibits?

Mr. Worthington: Yes.

(Testimony of J. A. Steward.)

Mr. Crump: Otherwise, I would have to take up time offering to lay the foundation. Or I can offer in each instance to lay the foundation.

The Court: You are not objecting to them because of lack of foundation, but simply that they are immaterial?

Mr. Worthington: Simply incompetent, irrelevant and immaterial.

Mr. Crump: Very well.

Mr. Crump then continued reading the offer of proof, as follows:

“The letter of November 19, 1941, shows very clearly that the volume of shipments is not the thing that controls the price. Take, for instance, the season 1941—during the week ending August 9th under proration the highest price for the season was reached, \$4.75. Four weeks later the lowest price was reached, \$2.32. In 1940 when there was no proration the highest price was reached in the week ending August 2, \$6.17, and the lowest price was not reached until seven weeks later, \$2.31. In the week ending July 5, 1941, 717 cars were shipped, and the price was \$4.65 F.O.B. In the year 1940, 307 cars moved during the same week and the price was only \$2.73. This is reversed when we refer to the week ending July 26, when shipments of 577 cars were made in 1941, at the price of \$3.17, and in 1940, 642 cars were shipped and the [138] price was \$3.75.

(Testimony of J. A. Steward.)

But a still better example would be the week ending August 2nd, 1941, when 705 cars were shipped at a price of \$4.04, whereas for the same week in 1940, 716 cars were shipped at a price of \$6.17.

“The number of cars shipped in any particular week does not appear to be, and is not the controlling factor with reference to price. The factors controlling prices in the market are weather conditions, which have the greatest influence and which are unpredictable at the time of shipment, health conditions, the condition of the lemons themselves in the market upon arrival, the sizes that are being shipped, and to some extent consumer income.

“A satisfactory price for lemons is a price which will return to the grower a reasonable interest on his investment. It is a mooted question as to what that price should be. It depends on the percentage of the crop sold; for instance, if half of the crop is eliminated, the price for the remainder has to be much higher than as though the larger percentage of the crop is sold.

“The jobbing trade is not subjected to increased risks in a market which is not controlled by a prorate order, that is, a market controlled by a proration order such as Order No. 53. The jobber is able to take care of himself and prefers to buy his lemons when he

(Testimony of J. A. Steward.)

needs them and when he thinks he can make money out of them, rather than have a specified number of cars shipped each week.

“I have made a computation to determine whether the return per acre to the grower is controlled by the per box price, or is reflected in the per box price. This consists of a type-written compilation showing half the crop packed and shipped and the remainder diverted to [139] by-products; also showing three-fourths of the crop packed and shipped and one-fourth diverted to by-products; also showing 90% of the crop packed and shipped and 10% diverted to by-products.

“We start out with a 10 acre grove and assume that the average yield on a five year basis is 4330 field boxes, less 216 boxes, or 5% eliminated as unfit for by-products, leaving 4114 field boxes. Then we take one-half of the crop packed and shipped at a delivered price of \$4.50, which price is taken in this instance because it is the price which the proponents of Order No. 53 testified at the promulgation hearing before the United States Department of Agriculture was the lowest price which would return a reasonable profit to the growers.”

Mr. Crump then offered in evidence the compilation referred to in the offer, and the same was marked defendants' Exhibit “B” for identification.

(Testimony of J. A. Steward.)

Mr. Worthington: May it please the court, I understand these offers are all a part of the offer he is making.

Mr. Crump: That is correct.

Mr. Worthington: And not separate offers. But when he finishes reading his offer, I understand that my objection will go to these.

Mr. Crump: It is understood that the objections to the offer of proof will go to the exhibits, as well as the offer of proof.

The Court: Very well. Go ahead.

“Mr. Crump: Referring to Exhibit ‘A’, the witness has prepared a summary showing similar percentages as regards M.O.D.”

At this time we offer in evidence the summary referred to as the next exhibit.

The Court: Mark it C for identification. [140]

(The document referred to was marked “Defendants’ Exhibit C for identification.”)

“Mr. Crump: The witness has prepared a summary showing the amounts of the allotments given to the various houses of M.O.D., the certificates of adjusted allotments, the total of packed boxes and cars, the alleged overshipments and undershipments, the forfeits, the by-products reduced to packed boxes and cars, and the amount of alleged violation in packed boxes and cars. This summary consists of a summary for all M.O.D. houses, with separate summaries for the several houses including

(Testimony of J. A. Steward.)

Libby Fruit Packing Company, Orange County Citrus Growers, Inc., and Escondido Cooperative Citrus Association, who are not defendants in these cases. The information contained in these tabulations was furnished by the Lemon Administrative Committee, the only change from that information being the conversion from packed boxes into cars on the basis of 406 boxes to a car."

And we offer this in evidence as the next exhibit.

The Court: It may be marked as Exhibit D for identification.

(The document referred to was marked "Defendants' Exhibit D for identification.")

Mr. Crump then continued reading from the offer of proof as follows:

"Since the defendant associations affiliated with M.O.D. began complying with Order No. 53 because of the restraining orders issued in these consolidated cases, there have been times when there was a shortage of lemons in the interstate market, notably the State of Washington, in the month of July, 1941, when and where there were insufficient lemons to fill the consumer demand, which [141] resulted in an exorbitantly high price to consumers and a loss of net profits to the growers, which could have been avoided had Order No. 53 not been in effect and had M.O.D. been permitted to fill

(Testimony of J. A. Steward.)

its orders and ship the lemons available for shipment which it had on hand.”

“The witness has prepared a tabulation showing the percentage of interstate lemon shipments by M.O.D. compared with the total California shipments for the seasons 1929-30 to 1940-41.”

We offer this tabulation as the next exhibit.

The Clerk: Exhibit E for identification.

(The document referred to was marked “Defendants’ Exhibit E for identification.”)

Mr. Crump then continued reading from the offer of proof as follows:

“On June 1, 1941, when the first allotments were issued under Order No. 53, M.O.D. had orders on hand, including standing orders, for one or more carloads per customer weekly during the season, and after June 1, 1941, it continued to receive standing orders from time to time, as well as additional orders for immediate shipment. These orders were received from regular customers who desired to purchase lemons from M.O.D., and who had for many years past purchased lemons from M.O.D. These orders reflected minimum requirements of the customers based upon their experience in previous years, regardless of price, and could and would have been filled by M.O.D., and its member associations at prevailing

(Testimony of J. A. Steward.)

prices, except as it and its member associations were prevented from filling said orders by reason of Order No. 53.

“From June 1, 1941, to August 31, 1941, the associations affiliated with M.O.D. received certificates of ad- [142] justed allotments to the extent of 345.1 carloads. Actual shipments interstate were 448.9 carloads. Shipments in excess of adjusted allotments (all within the first five weeks of the operation of Order No. 53) were 89.2 carloads. During this same time, that is to say from June 1st to August 31st, 1941, M.O.D. and its member associations had on hand orders which it and they were unable to fill, as follows: Standing orders placed with member associations 84 cars; individual orders placed with member associations 17 cars; standing orders received by M.O.D. from regular customers, which were not placed with any member association but were offered to all associations from time to time and not accepted because of their inability to fill the orders, 68 cars; individual orders received by M.O.D. from regular customers, which were not placed with member associations because of their inability to fill the orders, 88 cars; total 257 cars. Of this total of 257 cars the members associations of M.O.D. who are defendants herein had on hand lemons of the grades and sizes necessary to fill such orders, to the extent of 200

(Testimony of J. A. Steward.)

cars, and they would have filled said orders to the extent of 200 cars if they had not been prevented from so doing by said Order No. 53.

“In addition to the 200 cars which the member associations of M.O.D. could and would have sold and shipped interstate had it not been for Order No. 53, such member associations could and would have shipped an additional 50 cars of lemons.

“All of the lemons which could and would have been so shipped, both on order and otherwise, could and would have been shipped at a net profit to the growers whose lemons were handled by M.O.D. and its member associations. [143] The direct loss to the growers whose lemons are handled by M.O.D. and its member houses, from June 1, 1941, to October 31, 1941, by reason of the limitation of shipments of their lemons under Order No. 53, is in excess of \$270,000.

“The natural and necessary effect of Order No. 53 is to take away from M.O.D. and its member associations their regular customers and compel their customers to purchase their lemons from California Fruit Growers Exchange.

“The ultimate effect of Order No. 53, if continued in operation, will be to force all handlers out of business, except California Fruit Growers Exchange, and create in that Exchange a complete monopoly in the handling of lemons.

(Testimony of J. A. Steward.)

“Said Order will also compel M.O.D. and its member associations to sell a larger percentage of their lemons through the auction markets, with the resulting loss of net returns to the growers, for the reason that the limitation on shipments effected by Order No. 53 prevents M.O.D. and its member associations from filling orders and from advising its regular customers that it will be unable to fill their orders.”

At this time I offer in evidence a tabulation showing packed lemon shipments—I think those are interstate?

The Witness: Yes.

Mr. Crump: —interstate, by months, for the seasons 1939-40, and the season 1940-41.

The Court: It may be marked for identification next in order.

The Clerk: Exhibit F for identification.

(The document referred to was marked “Defendants’ Exhibit F for identification.”) [144]

Mr. Crump: I now offer in evidence the tabulation showing the operations of the Lemon Prorate Order No. 53, as it has affected M. O. D. and its member houses, from June 1, to October 31, of 1941, to which I have referred.

The Clerk: Exhibit G for identification.

(The document referred to was marked “Defendants’ Exhibit G for identification.”)

(Testimony of J. A. Steward.)

Mr. Crump: That is my offer of proof from this witness.

Mr. Worthington: May it please the court, I object to the offer on the ground that it is incompetent, irrelevant and immaterial.

The Court: I have heretofore held that I consider this evidence immaterial, but I am giving Judge Crump an opportunity of protecting his record.

Mr. Worthington: May I ask at this time——

Mr. Crump: I think Mr. Worthington is also protecting his record by objecting to the offer of proof, as well as the——

Mr. Worthington: Yes. In view of the great rapidity and length of the offer I would like to reserve my right to cross examine the present witness.

The Court: No, I will not permit any cross examination, because it isn't in evidence. There isn't a thing in there that I have admitted in evidence. There is no cross examination necessary.

Mr. Worthington: May I ask, if the court is going to allow the details, read by Judge Crump in the offer of evidence, to be made a part of the Appellate record?

The Court: It will be an offer of proof.

Mr. Worthington: Which, however, will not show the details——

Mr. Crump: We have a right to show the details. That is the purpose of making an offer of proof so that the upper court will know what it is.

(Testimony of J. A. Steward.)

Mr. Worthington: I would like to ask, if your Honor please, if the court ruled that it isn't accepting the offer of proof as part [145] of the record for the Appellate Court?

The Court: It is part of his offer of proof. It is admitted for that purpose only.

Mr. Worthington: And limited only to that?

The Court: Yes. As the court has indicated heretofore, this court feels that it is beyond its power to go behind Order No. 53. An examination of that will be necessary in the upper court, in their review, to go into the evidence that they are now offering. But at the same time, as Judge Crump has indicated here, he is in two courts, and he wants to be heard in one of the proceedings. And to protect himself he is offering it in this one, so that it will not be deemed as a waiver of any of his rights.

Mr. Crump: That is right.

The Court: And for that reason, I am giving counsel a full opportunity of protecting the record, so that if the Circuit Court should hold that I am in error in not admitting this evidence, then it will come back and have to be tried on the issues, and those issues presented.

Mr. Crump: And the only way the Circuit Court can know whether the evidence should be admitted is to know what it is.

The Court: The Circuit Court certainly, I assume, would not attempt to pass upon the weight to be given to that evidence, if they hold that the

(Testimony of J. A. Steward.)

court is wrong. It is simply presenting to the Circuit Court the evidence that they have offered to present here.

Mr. Worthington: So long as that is clearly understood——

Mr. Crump: I don't think there can be any question about it. The Circuit Court will see this evidence; this is what we offer; if they think the evidence should have been admitted they will send the case back, at which time Mr. Steward will have a chance to testify.

Mr. Worthington: Just so it is understood.

The Court: It isn't evidence in the case.

Mr. Worthington: And not being accepted as evidence, even [146] for the Circuit of Appeals.

Mr. Crump: It goes in the record to show the Circuit Court of Appeals what we wanted to prove.

The Court: I can't control what the Circuit Court of Appeals does. As far as this court is concerned, I am not receiving it as evidence.

Mr. Crump: I have four more of these statements, which are short matters.

The Court: I will give you two hours to get your breath, Judge Crump. We will take a recess until 2:00 o'clock.

Mr. Crump: Yes.

The Court: Wouldn't it be sufficient, inasmuch as you have these offers in writing, that you make a general statement. The writings will be deemed as read, and made a part of the record, as you offer.

(Testimony of J. A. Steward.)

Mr. Crump: Well, if the court would bear with me for a couple of hours this afternoon I will get it all in the record. I think that is the proper way to do it. There may be some parts here that your Honor might want to make a different ruling on.

The Court: Well, of course, I assume that the Government when you finish will then make an offer of proof to the contrary; but as I said before, I want to be consistent in my rulings. I hope to be.

Mr. Crump: Yes.

A. A. RIESLAND

called as a witness on behalf of defendants, testified as follows:

That he resided at Chula Vista; that his occupation was Lemon packing house manager, and Secretary-Treasurer of the Chula Vista Mutual Lemon Association; that he had been engaged as such manager since 1926.

Mr. Crump: I will state to your Honor that the evidence [147] offered by this witness, as well as that offered by the last witness, and those which I will offer by subsequent witnesses, is offered to prove that by reason of the allegations of the respective answers, in the affirmative portions of the answers, that Order No. 53, and the Orders of the Secretary supplementing said Order, all and each thereof is unjust, unreasonable, arbitrary and dis-

(Testimony of A. A. Riesland.)

criminatory as to the respective defendants, and this said Order and the Orders of the Secretary supplementing said Order, each and all constitute an unwarranted and unlawful exercise of the police powers, and are violative of the Fifth Amendment of the Constitution of the United States in that they deprive the respective defendants of their property without due process of law.

I make that statement at this time so that it may apply not only to the testimony already given or offered by Mr. Steward, but as to each of the witnesses, and I presume it will not be necessary for me to repeat that.

The Court: It will be deemed.

Mr. Crump: I presume that the same ruling will apply to this witness, as to Mr. Steward.

The Court: You can make your offer.

Mr. Crump: Very well.

We offer to prove by this witness that,

“Chula Vista Mutual Lemon Association is a handler of lemons, which since 1926 has marketed lemons in interstate commerce through Mutual Orange Distributors, as selling agent. Chula Vista Mutual Orange Distributors, as selling agent. Chula Vista Mutual Lemon Association is a cooperative nonprofit corporation, organized under the laws of California. It handles from 550 to 650 carloads of lemons annually. In the season of 1940-41 it shipped approximately 425 cars of lemons in inter-

(Testimony of A. A. Riesland.)

state commerce. This Association handles only lemons. The Association has had a steady growth [148] from its inception. In 1926-1927 it handled about 75 carloads for 30 growers. In the year 1940-1941 it handled 645 cars of lemons for 175 growers. From November 1, 1940, to and including October 31, 1941, this Association shipped interstate 163,732 packed boxes. It sold intrastate 3715 packed boxes, and sent to by-products lemons culled at the washer, 36,979 packed boxes, and culled from pack-out, 43,072, making a total of lemons handled of 247,498 boxes. The total field boxes received during the same period and converted to packed boxes was 279,427."

That is the number of packed boxes.

"The difference between this amount and the 247,498 packed boxes is accounted for by shrinkage and decay in the amount of 31,929 boxes. Of the 247,498 packed boxes referred to, 135,641 were handled from November 1, 1940, to May 31, 1941, and 111,857 from June 1, 1941, to and including October 31, 1941. The 135,641 boxes handled between November 1, 1940, and May 31, 1941, are accounted for as follows:

Interstate shipments.....	92,678
Intrastate shipments.....	917
By-products (culled at washer).....	22,944
By-products (culled from pack-out).....	19,102

(Testimony of A. A. Riesland.)

“Of the 111,857 boxes handled from June 1 to October 31, 1941, 71,054 were shipped in interstate commerce, 2798 were sold intrastate, 14,034 were disposed of to by-products (culled at washer) and 23,971 were disposed of to by-products (culled from pack-out).

“The foregoing figures showing amount of culls at washer are based on total movement of fruit for the periods given, irrespective of the amount of fruit washed. Actually the 22,944 boxes culled prior to June 1st were [149] out of 187,667 boxes washed, or 12.23% culls, while the 14,034 boxes culled at the washer after June 1st were out of 61,955 boxes, or 22.65% culls, so that the actual cullage at the washer after June 1st, based on the amount of the fruit washed, was almost twice as heavy as the cullage prior to June 1st. In previous years when operations were not curtailed by Order No. 53, the cullage at the washer was always much heavier prior to June 1st of each season than it was after June 1st.

“This Association handles a comparatively large percentage of small size fruit. The packed fruit averages from 440 to 450 lemons per box in size and virtually all of it is sold in the Southern states at private sales. Less than 3% on the average of packed fruit has been sold at auction. From June 1, 1941, to October 31, 1941, the percentage of sales at auction in-

(Testimony of A. A. Riesland.)

creased to over 6%. This increase was the direct result of the operation of Order No. 53. Chula Vista Mutual Lemon Association has regular customers who have bought from it year in and year out for more than ten years, almost exclusively, and more than 90% of the lemons sold in fresh fruit form are sold in the Southern states. More than 50% of the fruit handled by the Association is tree ripe when picked. Prior to June 1, 1941, this Association had market outlets for all of its merchantable lemons. The heaviest demand for the small lemons handled by this Association is in April, May and June. The tree ripe lemons handled by this Association will keep in storage not over 30 days, after which they deteriorate rapidly and decay and become unfit for market. On June 1, 1941, this Association had about 150 cars of lemons in storage. It had orders for 20 carloads on hand that should have been filled the week previously. [150] It was that far behind in filling its orders. During the month of May, 1941, the Association was shipping about 17 or 18 cars a week. Its allotment for the second week in June was less than 5 carloads. For the third week in June its allotment was between 4 and 5 carloads; and for the last week in June its allotment was between 4 and 5 carloads.

“This Association began complying with Order No. 53 in the week beginning July 6,

(Testimony of A. A. Riesland.)

1941. It has storage capacity for between 160 and 170 cars which was adequate for it to operate efficiently under conditions existing before Order No. 53 became effective. In order to continue to operate under Order No. 53 it is necessary that this Association have additional storage to the extent of at least 50 cars, and air conditioning equipment which will cost more than \$50,000.00. Otherwise, it will be unable to ship more than one-third of its merchantable lemons.

“Operating under Order No. 53 the quality of fruit sent to market is inferior to the quality of the fruit shipped when the Order is not in effect. The reason for this is that the allotments given to this Association are so small in amount as to require it to keep fruit in storage until it has begun to deteriorate and until shrinkage and decay have set in in substantial amounts. Order No. 53 has required this Association to eliminate, either by dumping or sending to by-products, a large proportion of its fruit, which it otherwise could and would have sold in fresh fruit form interstate. Order No. 53 has compelled this Association to advise its customers of its inability to supply their orders and has resulted in its customers buying lemons from California [151] Fruit Growers Exchange, which they otherwise would have bought from it.

“If Order No. 53 continues in effect, it will

(Testimony of A. A. Riesland.)

result in California Fruit Growers Exchange obtaining a complete monopoly of the market of lemons and in compelling this Association and other Associations similarly situated to retire from business as lemon handlers. If this Association had not over-shipped during the month of June, 1941, its growers would not have received any profit for the past season from lemons handled by Chula Vista Mutual Lemon Association. The lemons shipped by this Association in interstate commerce during the month of June, 1941, were sold on a high market and if this Association had complied with Order No. 53 prior to the week beginning July 6, 1941, it would have had to eliminate more than 37 cars of lemons which it did, in fact, ship and sell at a profit to its growers. This Association sells interstate only Fancy or First Grade and Choice or Second Grade lemons. These are sold under the brands of "Gilt Edge" and "Silver Lining", respectively, and these brands of "Gilt Edge" and "Silver Lining", together with the trade names for similar fruit used by Mutual Orange Distributors, to-wit, "Pure Gold" and "Silver Seal" have become well and favorably known to the trade which desires to continue to buy the lemons handled by this Association, and which would continue to buy all merchantable lemons of this Association were it not prevented from so doing by Order

(Testimony of A. A. Riesland.)

No. 53. The greatest asset of this Association is the good will which it has built up over a period of years and which has resulted in the demand for lemons handled by it and this asset will be largely, if not entirely, lost to this Association by its inability [152] to fill the requirements of its regular customers because of the limitation of shipments under Order No. 53. The type of lemons handled largely by this Association differs from the type handled by most handlers, in that small size lemons must be shipped while the demand is heaviest in the Southern states, which is ordinarily in April, May and June of each year. Order No. 53 does not permit of sufficient shipments during these months to enable this Association to dispose of the fruit which its business requires that it dispose of prior to July 1st of each year, whereas Associations handling larger percentages of green lemons and larger sized lemons have their biggest demand and best prices ordinarily during the months of July, August and September of each year.

“Hence, Order No. 53 discriminates against this Association, in that it treats small size tree ripe lemons and large size green lemons as though they were the same product with the same seasonal outlets. To illustrate: An Association having 10 carloads of freshly picked dark green lemons in storage on April 1st can

(Testimony of A. A. Riesland.)

keep those lemons in storage for as long as six months, with the result that its prorated allotments are based upon a six months' storage life of these 10 cars, thus enabling it to sell other lemons during that six months period to the extent of the six months' storage on these 10 cars, whereas Chula Vista Mutual Lemon Association, with 10 carloads of freshly picked small size tree ripers in storage on April 1st, must sell and ship all of those lemons by May 1st, and its prorated allotments under Order No. 53, based on the storage life of these 10 carloads of tree ripe lemons, would permit shipment of other lemons for only 30 days. In other words, the storage [153] of green lemons constitutes a base for allowance of allotments under Order No. 53 for six months, whereas, the storage of tree ripe lemons constitutes a base for allotments for only one month, or to express it differently; assuming one carload of lemons can be shipped each week against 10 carloads in storage. One Association, we will say, has 10 carloads of the tree ripers in storage, which will keep 4 weeks; another association has 10 carloads of greens in storage, which will keep 24 weeks; and as against these 10 carloads, one carload a week can be shipped. It necessarily follows that the association having the 10 carloads of tree ripe lemons can ship against them 4 carloads, whereas the association having 10 car-

(Testimony of A. A. Riesland.)

loads of greens can ship against them 24 carloads, or six times as much. In this manner not only is this Association, but other associations similarly situated, discriminated against by Order No. 53 as against associations handling larger percentages of green lemons. Order No. 53 compelled this Association to send to by-products, or otherwise eliminate, more than 75 earloads of merchantable fruit from July 6, 1941, to October 31, 1941, which it could and would otherwise have sold in interstate commerce at a profit to its growers. This Association's average storage of lemons as of September 1, 1935, to 1940, inclusive, was 6193 boxes, whereas on September 1, 1941, because of the limitations on sales and shipments made requisite by Order No. 53, it had 53,150 boxes in storage. Its average July and August returns to growers in 1941 was \$3.04 per hundred pounds, while its average returns to growers for September and October, 1941, was \$1.35 per hundred pounds. Had it been allowed to ship the 53,150 [154] boxes amounting to 2,498,000 pounds in July and August when its trade was demanding this fruit, it would have returned to its growers for those two months an additional \$75,000.00.

"The September and October returns on 29,400 storage boxes, which this Association was not allowed to ship under Order No. 53 and

(Testimony of A. A. Riesland.)

which it could and otherwise would have shipped, returned approximately \$18,000.00. 20,000 storage boxes of culls were salvaged which brought a return of approximately \$11,000.00. The net loss was approximately \$45,000.00. The better prices are obtained at private sale markets for carloads of straight sizes, that is to say, carloads where there are not more than 2 sizes included; such, for instance, as 300's and 360's and 432's, or straight cars of 490's and smaller. Order No. 53 has a necessary and natural tendency to, and does, in fact, prevent, in most instances, the shipments of carloads of straight sizes or of two sizes.

“Except in the Southern markets in the months of April, May and June, medium size lemons, that is to say, 300's and 360's, bring the best prices. There is a natural and necessary shrinkage in size of lemons in storage. Lemons larger than 300's shrink to a medium size which increases the per box price, for instance; 252's which is the next size larger than 300's, usually brings from 50 cents to a dollar a box less on the market than 300's and 252's will normally shrink in storage to 300's in about 60 days, thereby increasing the market value per box from 50 cents to a dollar a box. On the other hand, 432's will normally shrink in storage to 490's within 30 days with a resulting depreciation in price of from 50 cents to

(Testimony of A. A. Riesland.)

a dollar a box. So also, 490's will [155] shrink to 540's when in storage for 30 days, with a similar depreciation. 540's and smaller, with similar shrinkage, are usually not marketable at all. The market for small size lemons, that is to say, lemons smaller than 360's, in substantial quantities is limited to about four months a year, that is to say, April, May, June and July, during which months small size lemons ordinarily bring better prices than large size lemons, whereas there is, throughout the year, a more or less steady demand for 300's and 360's.

“These facts further illustrate and emphasize the discrimination created by and inherent in Order No. 53 as against small size and tree ripe lemons. Small size tree ripe lemons, such as are handled by this Association, because of their short storage life and the limited period in which they can be marketed and sold and because of the shrinkage which occurs in storage, constitute practically a perishable fruit similar to peaches, apricots and other deciduous fruits, which has to be shipped almost immediately after picking. Order No. 53, nevertheless, groups this type of lemons with green lemons which can be kept in storage for as long as six months and which can be marketed to advantage through the year. Thus Order No. 53, in effect, regulates the marketing of two different

(Testimony of A. A. Riesland.)

types of crops under one proration plan, which two types of crops do not, in fact, compete with each other, and which it is neither practicable nor fair to include within one prorate order or plan, and which is not contemplated or permitted by the Act. It costs just as much to grow a small tree ripe lemon as it does to grow a large size green lemon, but the natural and necessary effect of Order No. 53 is to [156] permit the shipment of much larger quantities of green lemons than of tree ripe lemons, particularly small tree ripe lemons, regardless of market demands. This also results in a discrimination against growers and handlers of tree ripe lemons.

“For the week beginning June 1, 1941, the Secretary of Agriculture, pursuant to recommendations of the Lemon Administrative Committee, fixed the allotment of Chula Vista Mutual Lemon Association at 2673 packed boxes.”

“Similarly, for the week beginning June 8, 1941, the allotment of this Association was fixed at 1959 packed boxes.

“Similarly for the week beginning June 15, 1941, the allotment of this Association was fixed at 2206 packed boxes.

“Similarly, for the week beginning June 22, 1941, the allotment of this Association was fixed at 2307 packed boxes, which was subsequently changed to 2402 boxes.

(Testimony of A. A. Riesland.)

“Similarly, for the week beginning June 29, 1941, the allotment of this Association was fixed at 2555 packed boxes.

“Similarly, for the week beginning July 6, 1941, the allotment of this Association was fixed at 2149 packed boxes.

“Similarly, for the week beginning July 13, 1941, the allotment of this Association was fixed at 2281 packed boxes.

“Similarly, for the week beginning July 20, 1941, the allotment of this Association was fixed at 1959 packed boxes.

“Similarly, for the week beginning July 27, 1941, [157] the allotment of this Association was fixed at 3537 packed boxes.

“Similarly, for the week beginning August 3, 1941, the allotment of this Association was fixed at 3176 packed boxes.

“Similarly, for the week beginning August 10, 1941, the allotment of this Association was fixed at 4009 packed boxes.

“Similarly, for the week beginning August 17, 1941, the allotment of this Association was fixed at 1836 packed boxes.”

“Similarly, the Secretary has fixed allotments of this Association for each week subsequent to the week ending August 24, 1941, in varying amounts, for which certificates of allotments and certificates of adjusted allotments have been issued by said Committee. At

(Testimony of A. A. Riesland.)

no time have the allotments fixed for this Association been sufficient in amount to enable it to fill the requirements of its customers or to market the merchantable lemons which it had available for marketing in interstate commerce and which it could and would otherwise have marketed.”

WARD DANIELS,

called as a witness on behalf of the defendants testified as follows:

I reside at Ventura, California; I am Manager of the Ventura County Orange and Lemon Association, one of the defendants herein, and have been engaged in that occupation eleven years.

The Court: Is it stipulated it may be deemed as read, and become part of the record without reading it?

In fact, the court will so order.

(The statement deemed read into the record is as follows:) [158]

“We offer to prove by this witness the following facts:

“Ventura County Orange and Lemon Association has sufficient storage capacity in its lemon packing house at Montalvo, Ventura County, California, for about 350 cars of lemons. The packing house at Montalvo handles

(Testimony of Ward Daniels.)

only lemons. When Order No. 53 went into effect in April, 1941, this Association had a storage capacity of only 105 cars, which was sufficient to enable it to operate economically and successfully under the method of operation in effect prior to Order No. 53. The increased storage has been taken care of by the erection of a new building and the installation of additional equipment, the construction of said building being commenced in March, 1941, and being made necessary solely by reason of the anticipation of volume proration of a federal order. The construction and installation was sufficiently finished on May 24, 1941, to permit of the use of the additional storage facilities, but packing operations did not begin in the enlarged plant until July, 1941.

“The expense of the additional construction and installation made necessary by the anticipated Proration Order and made necessary by Order No. 53 was approximately \$132,000.00.

“The additional storage was required to operate under Order No. 53 because at certain periods of the year lemon picks of growers, whose lemons are handled by Ventura County Lemon and Orange Association, are much heavier than at other times and the amount of fruit which the Association is permitted to ship under Order No. 53 is not sufficient to take care of all marketable fruit being picked or of all market-

(Testimony of Ward Daniels.)

able fruit for which orders [159] have been received.

“Under Order No. 53 it is necessary to keep lemons in storage for a longer period of time than it was previously necessary to keep them. The keeping of lemons in storage for a longer period of time than was customary or necessary under the marketing methods used before Order No. 53 became effective, which marketing methods were modern and efficient, has resulted in deterioration in much of the fruit before it could be shipped. While dark green lemons will keep in storage six months, it is advisable to ship them as soon as they are cured in order that they may reach the consumer while the fruit still has plenty of life left in it. If dark green lemons are shipped, that is to say, lemons which are dark green when picked, after being in storage for six months, there is little life left in them when they reach the consumer. When we refer to ‘Consumer’ and ‘Market’ we are referring to lemons which are shipped in interstate commerce and not those consumed locally in the State of California.

“Ventura County Lemon and Orange Association is a cooperative marketing corporation, engaged in the business of packing and selling lemons through Mutual Orange Distributors in interstate commerce since 1932. It handles lemons for more than one hundred growers, having

(Testimony of Ward Daniels.)

approximately a producing acreage of two thousand acres. Lemons can only practically and economically be packed and shipped in less than carload lots when shipped with other citrus fruits, which frequently cannot be done. Ventura County Lemon and Orange Association cannot compete successfully with other handlers or compete with other handlers at all, if it is not [160] permitted to pack and ship at least three carloads at a time, and frequently it is necessary to pack at least four or five carloads at a time, depending upon sizes and grades of lemons on hand and the market demand.

“When limited in our shipments, as we have been under Order No. 53, there have been many times when we have not been able to pack and ship the number of cars necessary in order to operate on a sound, economical or practical basis, with a resulting loss of fruit and of profits to our growers by reason of the necessity of rehandling fruit and because of increased deterioration and decay. To illustrate: Assume, as has often been the case, that we have an order from Boston for a carload of first grade 300’s and larger, or 406 packed boxes. It would be necessary for us to pack at least 1100 standard boxes to get these 406 boxes. If we take the figure of 1100 packed boxes necessary to obtain a carload of first grade 300’s and larger, there would be left 694 boxes of various grades

(Testimony of Ward Daniels.)

and sizes. Based upon our experience and the average run of lemons handled by our houses, these 694 boxes would be of such grades and sizes as to necessitate the packing of approximately three and one-half or more cars in order to obtain sufficient quantities of grades and sizes to be segregated into carloads in order to meet market demands. This illustration is typical of packing operations in our house. In other words, it would be necessary to pack six carloads in order to fill the Boston order and to avoid rehandling of the lemons left over.

“In packing lemons for market, we first take a storage box and dump the contents onto a moving belt and from there on to a conveyor into the waxing machine. [161] From the waxer it goes on to a grading table and all sizes and grades in the storage box go on to this table. They are there separated according to grades, standards or third grade fruit and culls being taken out first and sent to by-products; choice or second grade is put on another moving belt and fancy or first grade fruit is permitted to go through on the original belt. Both first and second grade fruit is packed and ordinarily all sizes are packed. As the lemons come from the grader onto the packing belt they are packed, but it is not practicable, in order to fill an order for 300's and larger first grade lemons, to pack only those grades and sizes for the

(Testimony of Ward Daniels.)

reason that the fruit which did not meet the requirements of this order would have to be put back in storage and rehandled, which increases decay and deterioration with a consequent loss of market value, and this also adds to the expense of handling. Before we were compelled by Order No. 53 to change our packing and shipping methods, less than two per cent of the fruit sent over the grader was returned to storage. This percentage has been necessarily increased by the operation of Order No. 53 and has at times been as high as fifty per cent. Of this fruit returned to storage a large part, which would otherwise be merchantable, either has to be sent to by-products or decays before it can be shipped.

“There is also a shrinkage in the weight and size of this fruit because of the prolonged storage, which proportionately decreases the returns to the growers. The rehandling of lemons more than doubles the handling cost.

“Order No. 53 has compelled us to keep our fruit [162] in storage beyond the time when it was in the best condition to market and would bring the best prices. Under the operation of this Order, the growers, whose lemons are handled by Ventura County Orange and Lemon Association, have made and will make less money that they would have made or would make if there were no such limitation on ship-

(Testimony of Ward Daniels.)

ments. To illustrate this: In the month of May, 1941, we packed fifty-three per cent out of 10,000 storage boxes. After the prorate went into effect, with the same quality of fruit, out of 10,000 storage boxes we packed only thirty-three per cent, because the necessity for holding the fruit in storage, due to limitations on our shipments effected by Order No. 53, reduced its quality and grade.

“The percentage of fruit sent to by-products and eliminated, as well as the percentage of intrastate sales, has substantially increased since June 1, 1941. This witness has prepared a tabulation taken from the records of Ventura County Orange and Lemon Association, showing packed box shipments interstate, intrastate sales, by-products disposals and elimination for the year beginning November 1, 1940, and also segregated as to that period of the year from November 1, 1940, to May 31, 1941, inclusive, and that period from June 1, 1941, to November 1, 1941; that is to say, to and including October 31, 1941. Total filled boxes received which, for convenience has been converted to packed boxes, for the season beginning November 1, 1940, was 235,094. Total packed boxes disposed of in fresh fruit from and to by-products, as well as that eliminated by dumping, totaled 230,817 boxes. Additional shrinkage and decay, not included in the items of interstate

(Testimony of Ward Daniels.)

ship- [163] ments, intrastate sales, by-products and elimination, amounted to 4277 boxes for the year. 152,909 packed boxes were sold in interstate, representing 66.247% of the total of 230,817 packed boxes; 21,661, or 9.384%, were sold intrastate; 53,783, or 23.301%, went to by-products; and 2,464, or 1.068%, were eliminated by dumping. For the period from November 1, 1940, to May 31, 1941, 88,156 boxes, or 80.701%, were disposed of interstate as against 64,753, or 53.260% for the period from June 1 to October 31, inclusive. From November 1 to May 31, 1,313 boxes, or 1.202%, were sold intrastate as against 20,348 boxes, or 16.736%, from June 1 to October 31, inclusive. From November 1, 1940, to May 31, 1941, 18,044 boxes, or 16.518%, were sent to by-products, as against 35,739, or 29.396%, for the period from June 1 to October 31, inclusive. From November 1, 1940, to May 31, 1941, 1725 boxes, or 1.579%, were eliminated by dumping, as against 739 boxes, or .068%, for the period from June 1 to October 31, inclusive. Of the total of 230,817 boxes, 109,238 were disposed of either by interstate or intrastate sales or by-products disposal or elimination, from November 1, 1940, to May 31, 1941, and 121,579 boxes during the period from June 1, to October 31, 1941. The increase in percentage of intrastate sales after November 1, 1941, is directly

(Testimony of Ward Daniels.)

ascribable to the operation of Order No. 53. Likewise, the increase in percentage of disposal of fruit to by-products was occasioned by the operation of that Order. Normally, the percentage of by-products disposal would have been greater during the period from November 1 to May 31, than the percentage of disposal during the subsequent period for the season. When Order No. 53 became [164] operative on the first of June, 1941, Ventura County Orange and Lemon Association had on hand more standing orders than it could fill, even without a prorated. It then had a backlog of at least 15 orders. All orders were received through Mutual Orange Distributors, the selling agency, and many of these orders were for one or more carloads a week in some instances during the remainder of the season and generally during the months of June, July, August and September.

“Ventura County Orange and Lemon Association has built up an interstate trade over a period of many years with regular customers who prefer the fruit handled by this Association and whose trade has become familiar with the trade and brand names of the lemons handled by this Association. In order to fill the orders of these customers, it is necessary that shipments move to market in accordance with their demands. In order to supply the de-

(Testimony of Ward Daniels.)

mand of its customers, this Association must know several weeks, and sometimes months, in advance of the volume it is going to be able to supply. This type of operation is radically different from sales at auction.

“Following the effective date of Order No. 53, the Secretary of Agriculture, acting upon the recommendations of the Lemon Administrative Committee, fixed the total quantity of lemons which might be handled in the current of interstate commerce for the weekly period beginning June 1, 1941, at 263,900 packed boxes and the allotment of this Association at 3251 packed boxes.

“Similarly, for the week beginning June 8, 1941, the Secretary fixed the total quantity at 233,450 packed boxes, and the allotment of this Association at 2876 pack- [165] ed boxes, which allotment was subsequently adjusted to 2733 packed boxes by deducting 143 boxes for alleged over-shipment.

“Similarly, for the week beginning June 15, 1941, the Secretary fixed the total quantity at 223,300 packed boxes and the allotment of this Association at 2802 packed boxes. -

“Similarly, for the week beginning June 22, 1941, the Secretary fixed the total quantity at 233,450 packed boxes, or 575 cars, and the allotment of this Association at 2930 packed boxes.

(Testimony of Ward Daniels.)

“On June 24, 1941, on the recommendation of said Committee, the Secretary increased the total quantity for the week beginning June 22nd from 575 to 700 cars and the allotment of this Association to 3567 packed boxes, which was subsequently adjusted to 3161 boxes for alleged over-shipments of 406 packed boxes.

“Similarly, for the week beginning June 29, 1941, the Secretary fixed the total quantity at 243,600 packed boxes, and the allotment of this Association at 2828 packed boxes.

“On July 2, 1941, on the recommendation of said Committee, the Secretary increased the total quantity fixed for the week beginning June 29, 1941, from 600 to 700 cars, and the allotment of this Association to 3300 packed boxes, which was subsequently adjusted to 3581 packed boxes, for an under-shipment of 281 boxes the previous week.

“Similarly, for the week beginning July 6, 1941, the Secretary fixed the total quantity at 284,200 packed boxes, and the allotment of this Association at 3300 packed boxes, which was subsequently adjusted to 3227 [166] by deducting 73 boxes for an alleged over-shipment.

“Similarly, for the week beginning July 13, 1941, the Secretary fixed the total quantity at 263,900 packed boxes, and the allotment of this Association at 3068 boxes, which allotment was subsequently adjusted to 3265 boxes because of

(Testimony of Ward Daniels.)

an under-shipment of 177 boxes in the previous week.

“Similarly, for the week beginning July 20, 1941, the Secretary fixed the total quantity at 233,450 packed boxes, and the allotment of this Association at 2731 packed boxes, which allotment was subsequently changed to 2703 packed boxes because of an alleged over-shipment of 28 packed boxes.

“Similarly, for the week beginning July 27, 1941, the Secretary fixed the total quantity at 223,300 packed boxes, and the allotment of this Association at 2930 packed boxes.

“On July 29, 1941, on the recommendation of said Committee, the Secretary increased the total quantity fixed for the week beginning July 27th from 550 cars to 700 cars, and the allotment of this Association to 3729 packed boxes, which was subsequently changed to 1370 boxes because of an under-shipment of 77 boxes in the previous week and a loan made by this Association to La Verne Cooperative Citrus Association of 2436 packed boxes.

“Similarly, for the week beginning August 3, 1941, the Secretary fixed the total quantity at 243,600 packed boxes, and the allotment of this Association at 3196 packed boxes.

“On August 5, 1941, on the recommendation of said Committee, the Secretary increased the total quantity fixed for the week beginning

(Testimony of Ward Daniels.)

August 3, 1941, from 600 [167] to 700 cars, and the allotment of this Association at 3729 packed boxes, which was subsequently changed to 3133 packed boxes to allow for a return of 1218 packed boxes loaned to LaVerne Cooperative Citrus Association, less an alleged over-shipment of 94 packed boxes.

“Similarly, for the week beginning August 10, 1941, it subsequently fixed the total quantity at 284,200 packed boxes and the allotment of this Association at 4704 packed boxes, which allotment was subsequently adjusted to 5865 boxes to allow for an alleged under-shipment of 406 packed boxes and loan paid back by La Verne Cooperative Citrus Association of 1218 packed boxes, less borrowings paid back of 57 packed boxes and less an alleged forfeit of 406 packed boxes.

“Similarly, for the week beginning August 17, 1941, the Secretary fixed the total quantity at 162,400 packed boxes and the allotment of this Association at 2688 packed boxes, which was subsequently adjusted to 3731 packed boxes to allow for 1218 packed boxes loaned to La Verne Cooperative Citrus Association less alleged over-shipment of 175 packed boxes.

“Similarly, the Secretary of Agriculture has fixed total quantities and the allotments of this Association for each week subsequent to the week ending August 24, 1941, in varying

(Testimony of Ward Daniels.)

amounts, for which certificates of allotment and certificates of adjusted allotment have been issued by the Lemon Administrative Committee.

“The allotments given Ventura County Orange & Lemon Association for each week beginning with June 1, 1941, to and including the week beginning August 17, 1941, as compared to the total quantities permitted to be shipped each week under Order No. 53, are typical of the [168] amount of allotment as compared to total quantities permitted to be shipped during the operation of Order No. 53.

“The natural and necessary result of the limitation of shipments under Order No. 53, insofar as this Association is concerned, has been, is, and will continue to be, during the operation of Order No. 53, to require this Association to eliminate from interstate fresh fruit trade channels large quantities of merchantable lemons, which it could, and otherwise would sell and ship in interstate commerce, at prices which would return a profit to the growers; and Order No. 53, as operated and as intended to operate, has caused, is causing, and will cause the loss of many thousands of dollars to this Association and its grower members.

“This is inherent in, and the necessary result of any limitation on shipments in interstate commerce on the basis of weekly or bi-weekly allotments, and any limitation on quan-

(Testimony of Ward Daniels.)

tities which may be shipped, with corresponding prorate allotments to this association, will have the same effect, unless the total quantities permitted to be shipped under Order No. 53 are fixed by the Secretary of Agriculture for each week in sufficient amounts to permit of a free movement of lemons in interstate commerce, which is contrary to the purpose, intent and theory of Order No. 53.

“During the period from June 1, 1941, to August 31, 1941, Ventura County Orange & Lemon Association received allotments totaling 52,375 packed boxes, or 129 carloads. During the same period this Association received orders for more than 100 carloads of lemons which it was unable to fill. During the same period this [169] Association had on hand merchantable lemons which it could and would have used to fill such orders to the extent of more than 60 carloads, but which it was prevented from selling and shipping in interstate commerce by reason of the operation of Order No. 53. All of said lemons could have been sold by this Association at prices which would have returned a substantial profit to the growers, but by reason of the limitations placed upon this Association in its marketing of lemons by Order No. 53 it was compelled to, and did divert such lemons to by-products, with a consequent loss to its growers of many thousands of dol-

(Testimony of Ward Daniels.)

lars. The highest price paid for by-products fruit during the months of June, July and August, 1941, was equivalent to 80 cents a packed box less a handling charge of 25 cents a packed box, which was less than one-half of the cost of production, including picking and hauling.

“Ventura County Orange and Lemon Association sells less than two per cent of its lemons at auction and approximately eighty per cent on order. It sells interstate only first grade or fancy and choice or second grade lemons, which are sold through Mutual Orange Distributors under the respective trade names of ‘Pure Gold’ and ‘Silver Seal’ and under the first grade brands of ‘Golden Acres’ and ‘Good Advice’ and second grade brand of ‘Silver Craft’. In order to return a per box profit to our growers it is necessary to sell lemons interstate at an average f.o.b. return of \$3.00 per box. The operation of Order No. 53 has substantially increased the costs to the growers, whose lemons are handled by Ventura County Orange and Lemon Association and reduced their returns correspondingly. The cost of operation [170] has been increased by the necessity of handling fruit more than once, the requirement of larger storage, the necessity for keeping an operating force on hand, which, without the prorate, could operate six days a week, but under the

(Testimony of Ward Daniels.)

limitations of the prorate actually operates in packing operations three to four days a week. This increased labor expense alone approximates \$40.00 a day.

“By reason of the limitations on its operations affected by Order No. 53, Ventura County Orange and Lemon Association and its growers have lost and are losing regular customers who are compelled to purchase lemons from other handlers.

“The only competitor of Mutual Orange Distributors and its member houses, including this Association, with a sufficient volume of lemons and sufficient prorate allotments and without sufficient private sale outlets to dispose of its lemons otherwise than by auction sales, is California Fruit Growers Exchange, which controls approximately ninety per cent of the total product in the United States. The natural and necessary effect of Order No. 53 is to take away from this Association its regular customers and compel its customers to purchase their lemons from California Fruit Growers Exchange.

“The ultimate effect of Order No. 53, if continued in operation, will be to force all handlers out of business, except California Fruit Growers Exchange, and create in that Exchange a complete monopoly in the handling of lemons.

“Said Order will also compel this Associa-

(Testimony of Ward Daniels.)

tion to sell a larger percentage of its lemons through the auction markets with a resulting loss of net returns [171] to the growers, for the reason that the limitation on shipments effected by Order No. 53 prevents this Association from filling orders and from advising its regular customers that it will be able to fill their orders.

“About ninety-five percent of the fruit sold interstate at auction is fruit handled by California Fruit Growers Exchange whose brand and trade names are established on the auctions and which has developed an auction demand which enables it to receive higher prices at auction sales than prices which are received by competitors, including this Association, whose brand and trade names have not been exploited by means of the auctions.

“This requires the growers whose lemons are handled by this Association and other handlers not affiliated with the California Fruit Growers Exchange, to compete with that Exchange in the sale of lemons to buyers who have purchased from the California Fruit Growers Exchange over a period of years, at the same time losing trade outlets which this Association and other non-Exchange handlers have developed over a period of years.

“This witness has caused to be prepared under his supervision from the records of Ventura County Orange and Lemon Association a

(Testimony of Ward Daniels.)

statement showing the amount of lemons in storage on the first day of September for each of the years 1935 to 1941, inclusive. He has caused to be prepared under his supervision from the records of this Association a tabulation showing interstate sales, intrastate sales, by-products disposal, and elimination, together with the amount of packed boxes handled and disposed of and also shrinkage and decay for the season [172] beginning November 1, 1940, and ending October 31, 1941. These we offer in evidence.

“Until the prorate went into effect under Order No. 53 this Association has been able to dispose of all of its merchantable lemons in interstate business to regular customers. An occasional car which could not be economically packed in grades and sizes to meet customers’ demands was sent to auction and cars were occasionally rolled for the same reason. By rolling, I mean shipping carloads of fruit without advance order to destinations outside of the State of California, where it is anticipated they can be disposed of profitably.

“This Association does not make a practice of rolling cars, but as explained it is necessary to pack fruit in addition to that required to fill orders and fruit thus packed may not meet the requirements of any order on hand and hence will be rolled to be disposed of in a market which will absorb various sizes and grades.

(Testimony of Ward Daniels.)

“Ventura County Orange and Lemon Association, again complying with Order No. 53, in the week beginning June 22, 1941”—

And I will offer in evidence, in connection with the offer of proof of this witness, a statement showing field box average f.o.b. packing house returns for 1940-41, for pools 1 and 2; pool No. 1 covering months of December, January and February; pool No. 2 covering the months of March, April and May, as the next exhibit.

The Clerk: Exhibit H for identification.

(The document referred to was marked “Defendant’s Exhibit H for identification.”)

Mr. Crump: And also a statement showing the percentage sent into by-products from pools No. 2 and 3 for the year 1941. [173]

Q. That would be, Mr. Daniels, the year 1940-1941; the year beginning 1940?

A. The year beginning 1941; pools 2 and 3.

Q. Well, the year beginning 1941 is not yet over, is it? It doesn’t end until October of this year?

Mr. Worthington: Is this offered as evidence?

Mr. Crump: No, it is merely preliminary to identifying the exhibit.

A. Let me see the exhibit.

Q. That refers to last year, doesn’t it; 1940-1941?

A. Last year. That starts with December, on pool No. 2.

Q. But the season is 1940-1941?

(Testimony of Ward Daniels.)

A. That is right.

Mr. Crump: All right, we will offer this.

The Court: It may be marked for identification.

The Clerk: Exhibit I for identification.

(The document referred to was marked "Defendant's Exhibit I for identification.")

C. I. CARTWRIGHT,

called as a witness on behalf of the defendants, testified as follows:

I reside at La Verne, California; I am Secretary-Manager of the LaVerne Cooperative Citrus Association, one of the defendants herein, and have been such since July, 1924.

Mr. Crump: We offer to prove by this witness the facts as set forth in the statement, which I will ask if it may be stipulated——

The Court: It may be deemed as read, and become part of the record. The reporter is directed to insert it into the record, the same as if it had been read in open court.

Mr. Crump: Yes, your Honor. [174]

(The statement deemed read into the record is as follows:)

"We offer to prove by this witness the following facts:

"La Verne Cooperative Citrus Association is a handler of lemons, engaged for many years in

(Testimony of C. I. Cartwright.)

handling lemons in interstate commerce, through Mutual Orange Distributors as its selling organization. 95% of the merchantable fruit of La Verne Cooperative Citrus Association is handled in interstate commerce; about 2% in intrastate commerce. It handles lemons for growers having about 680 acres. Less than 5% of the lemons handled in fresh fruit form are sold at auction; about 75% are handled on orders.

“This Association began complying with Order No. 53 in the week beginning June 15, 1941.

“For the week beginning June 1, 1941, the Secretary of Agriculture, pursuant to recommendations of the Lemon Administrative Committee, fixed the allotment of this Association at 3557 packed boxes.

“Similarly for the week beginning June 8, 1941 the allotment of this Association was fixed at 2741 packed boxes.

“Similarly for the week beginning June 15, 1941, the allotment of this association was fixed at 2282 packed boxes.

“Similarly for the week beginning June 22, 1941, the allotment of this Association was fixed at 2498 packed boxes.

“Similarly for the week beginning June 29, 1941, the allotment of this Association was fixed at 2692 packed boxes.

“Similarly for the week beginning July 6,

(Testimony of C. I. Cartwright.)

1941, the allotment of this Association was fixed at 2683 packed boxes. [175]

“Similarly for the week beginning July 13, 1941, the allotment of this Association was fixed at 2586 packed boxes.

“Similarly for the week beginning July 20, 1941, the allotment of this Association was fixed at 1728 packed boxes.

“Similarly for the week beginning July 27, 1941, the allotment of this Association was fixed at 5367 packed boxes.

“Similarly for the week beginning August 3, 1941, the allotment of this Association was fixed at 1709 packed boxes.

“Similarly for the week beginning August 10, 1941, the allotment of this Association was fixed at 1734 packed boxes.

“Similarly for the week beginning August 17, 1941, the allotment of this Association was fixed at 1218 packed boxes.

“Similarly the Secretary has fixed total quantities and allotments of this Association for each week subsequent to the week ending August 24, 1941, in varying amounts, for which certificates of allotments and certificates of adjusted allotments have been issued by said Committee.

“None of the allotments issued to this Association have been sufficient in amount to enable it to fill regular orders received from its cus-

(Testimony of C. I. Cartwright.)

tomers who have done business with it over a period of many years. Such customers have been compelled to buy lemons from competitors of this Association, particularly California Fruit Growers Exchange, which they would otherwise have bought from this Association, and which except for Order No. 53 [176] this Association would have sold to them from and after the time when it began complying with Order No. 53.

“The total number of field boxes of lemons passing through the house of this Association from November 1, 1940, to October 31, 1941, inclusive, converted to packed boxes was 242,714. Of this 236,227 packed boxes were disposed of in fresh fruit form and to by-products and eliminated by dumping. In addition there was a shrinkage of 6487 packed boxes while in storage. Of the 236,227 packed boxes disposed of from November 1, 1940, to and including October 31, 1941, 159,488, or 67.52% were sold in interstate commerce; 2811, or 1.19%, were sold intrastate. 66,107, or 27.98%, were sent to by-products, and 7821, or 3.31% were otherwise eliminated.

“Before the prorate became effective, that is to say from November 1, 1940, to May 31, 1941, inclusive, this Association handled 129,103 packed boxes, of which 96,795, or 74.98%, were sold interstate; 1014, or .78% were sold

(Testimony of C. I. Cartwright.)

intrastate; 29,143, or 22.57%, were sold to by-products, and 2151 or .167%, were eliminated by dumping.

“During the period from June 1, 1941, to and including October 31, 1941, 107,124 boxes were handled, of which 62,693, or 58.52% were sold interstate; 1797, or 1.68%, were sold intrastate; 36,964, or 34.51%, were sold to by-products; 5670, or 5.29%, were eliminated by dumping.

“The figures from June 1 to October 31 include fruit in Pool No. 4, some of which was held over until after November 1st and accounted for in January, 1942.

“The normal elimination and by-products for the period from November 1 to May 31 in each year is heavier [177] than for the period from June 1 to October 31, but this normal condition has been changed by Order No. 53. Of the by-products percentage of 34.51% for the period from June 1, 1941, to October 31, 1941, approximately 12% would normally have been sent to by-products, and of the elimination of 5.29% for the same period, approximately 3% would normally have been eliminated. In other words, the elimination for the period from June 1, 1941, to October 31, 1941, was increased by Order No. 53 and the operation of said order. The increase chargeable to the operation of this order was approximately

(Testimony of C. I. Cartwright.)

80 cars. Of this at least 60 cars could and would have been sold in interstate commerce by this Association, with a profit to the growers whose fruit is handled by this Association, had it not been prevented from selling the same by Order No. 53. In other words, La Verne Cooperative Citrus Association could and would have sold during the 1940-41 season at least 60 carloads of lemons which it was prevented from selling by the limitations placed upon its shipments by Order No. 53. This represents a loss to the growers whose lemons are handled by this Association of more than \$40,000 net.

“This Association has a storage capacity of 120 cars for lemons, but in order to operate under Order No. 53 it is necessary for it to increase its storage because of the necessity of keeping a larger quantity of lemons in storage and keeping lemons in storage for a longer period of time under said Order, by an additional 75 to 100 cars, which additional storage, with the necessary equipment, will cost about \$800 a car.

“Of the 60 cars which this Association was compelled by Order No. 53 either to send to by-products or to dump [178] at least 75% could and would have been sold on regular orders.

“This Association sells its lemons under the Mutual Orange Distributors trade names of

(Testimony of C. I. Cartwright.)

‘Pure Gold’ for fancy or first grade, and ‘Silver Seal’ for its choice, or second grade lemons. It has its own brands, i.e., ‘Pride of La Verne’ for first grade, and ‘Sweet Briar’ and ‘Pansy’ for second grade. This Association sells no third grade or standard lemons in interstate commerce.

“The lemons dumped by this Association during the operation of the prorate were a total loss to it and its growers, and those sent to by-products during the same period returned to the growers less than the cost of production.

“Under Order No. 53 it is necessary to keep lemons in storage for a longer period of time than it was previously necessary to keep them. The keeping of lemons in storage for a longer period of time than was customary or necessary under the marketing methods used before Order No. 53 became effective, which marketing methods were modern and efficient, has resulted in deterioration in much of the fruit before it could be shipped.

“While dark green lemons will keep in storage six months, it is advisable to ship them within three or four months in order that they may reach the consumer while the fruit still has plenty of life left in it. If dark green lemons are shipped, that is to say, lemons which are dark green when picked, after being in storage for six months there is little life

(Testimony of C. I. Cartwright.)

left in them when they reach the consumer. When we refer to 'Consumer' and 'Market' we are referring to lemons which are shipped in [179] interstate commerce and not those consumed locally in the State of California.

"In packing lemons for market, we first take a storage box and dump the contents on to a moving belt and from there on to a conveyor into the waxing machine. From the waxer it goes on to a grading table and all sizes and grades in the storage box go on to this table. They are there separated according to grades, standards or third grade fruit and culls being taken out first and sent to by-products; choice or second grade is put on another moving belt, and fancy or first grade fruit is permitted to go through on the original belt. Both first and second grade fruit is packed and ordinarily all sizes are packed. As the lemons come from the grader onto the packing belt they are packed, but it is not practicable, in order to fill an order for 300's and larger first grade lemons, to pack only those grades and sizes, for the reason that the fruit which did not meet the requirements of this order would have to be put back in storage and rehandled, which increases decay and deterioration with a consequent loss of market value, and this also adds to the expense of handling. Before we were compelled by Order

(Testimony of C. I. Cartwright.)

No. 53 to change our packing and shipping methods, less than two per cent of the fruit sent over the grader was returned to storage. This percentage has been necessarily increased by the operation of Order No. 53 and has at times been as high as fifty per cent.

“Of this fruit returned to storage, a large part, which would otherwise be merchantable, either has to be sent to by-products or decays before it can be shipped. There is also a shrinkage in the weight and size of this [180] fruit because of the prolonged storage, which proportionately decreases *and* returns to the growers. The rehandling of lemons more than doubles the handling cost.

“Order No. 53 has compelled us to keep our fruit in storage beyond the time when it was in the best condition to market and would bring the best prices. Under the operation of this Order, the growers whose lemons are handled by La Verne Cooperative Citrus Association have made and will make less money than they would have made or would make if there were no such limitation on shipments.

“La Verne Cooperative Citrus Association has built up an interstate trade over a period of many years with regular customers who prefer the fruit handled by this Association and whose trade has become familiar with the trade and brand names of the lemons handled by

(Testimony of C. I. Cartwright.)

this Association. In order to fill the orders of these customers, it is necessary that shipments move to market in accordance with their demands. In order to supply the demand of its customers, this Association must know several weeks, and sometimes months, in advance, the volume it is going to be able to supply. This type of operation is radically different from sales at auction.

“The natural and necessary result of the limitation of shipments under Order No. 53, insofar as this Association is concerned, has been, is, and will continue to be, during the operation of Order No. 53, to require this Association to eliminate from interstate fresh fruit trade channels large quantities of merchantable lemons, which it could and otherwise would sell and ship in interstate commerce, at prices which would return a profit to the growers; and Order No. 53, as oper- [181] ated and intended to operate, has caused, is causing, and will cause the loss of many thousands of dollars to this Association and its grower members. This is inherent in, and the necessary result of any limitation on shipments in interstate commerce on the basis of weekly or bi-weekly allotments, and any limitation on quantities which may be shipped, with corresponding prorated allotments to this Association, will have the same effect, unless the total quantities

(Testimony of C. I. Cartwright.)

permitted to be shipped under Order No. 53 are fixed by the Secretary of Agriculture for each week in sufficient amounts to permit of a free movement of lemons in interstate commerce, which is contrary to the purpose, intent and theory of Order No. 53.

“By reason of the limitations on its operations effected by Order No. 53, La Verne Co-operative Citrus Association and its growers have lost and are losing regular customers who are compelled to purchase lemons from other handlers. The only competitor of Mutual Orange Distributors and its member houses, including this Association, with a sufficient volume of lemons and sufficient prorated allotments, and without sufficient private sale outlets to dispose of its lemons otherwise than by auction sales, is California Fruit Growers Exchange, which controls approximately 90% of the total product in the United States. The natural and necessary effect of Order No. 53 is to take away from this Association its regular customers and compel its customers to purchase their lemons from California Fruit Growers Exchange.

“The ultimate effect of Order No. 53, if continued in operation, will be to force all handlers out of business, except California Fruit Growers Exchange, and create in that Exchange a complete monopoly in the handling [182] of lemons.

(Testimony of C. I. Cartwright.)

“Said Order will also compel this Association to sell a larger percentage of its lemons through the auction markets, with a resulting loss of net returns to the growers, for the reason that the limitation on shipments effected by Order No. 53 prevents this Association from filling orders and from advising its regular customers that it will be able to fill their orders. About 95% of the fruit sold interstate at auction is fruit handled by California Fruit Growers Exchange, whose brand and trade names are established on the auctions and which has developed an auction demand which enables it to receive higher prices at auction sales than prices which are received by competitors, including this Association, whose brand and trade names have not been exploited by means of the auctions.

“This requires the growers whose lemons are handled by this Association, and other handlers not affiliated with the California Fruit Growers Exchange, to compete with that Exchange in the sale of lemons to buyers who have purchased from the California Fruit Growers Exchange over a period of years, at the same time losing trade outlets which this Association and other non-Exchange handlers have developed over a period of years.

“Until the prorate went into effect under Order No. 53 this Association has been able to

(Testimony of C. I. Cartwright.)

dispose of all of its merchantable lemons in interstate business to regular customers. An occasional car which could not be economically packed in grades and sizes to meet customers' demands were sent to auction, and cars were occasionally rolled for the same reason. [183]

“By rolling, I mean shipping carloads of fruit without advance order to destinations outside of the State of California, where it is anticipated they can be disposed of profitably. This Association does not make a practice of rolling cars, but, as explained, it is necessary to pack fruit in addition to that required to fill orders and fruit thus packed may not meet the requirements of any order on hand and hence will be rolled to be disposed of in a market which will absorb various sizes and grades.”

G. E. ESTABROOK,

called as a witness on behalf of the defendants, testified as follows:

I reside near La Habra, California, and I am Manager of the Index Mutual Association, one of the defendants herein. I have been engaged in that occupation for three years; before that I was connected with this Association as foreman for about fourteen years.

Mr. Crump: At this time we offer to prove by

(Testimony of G. E. Estabrook.)

this witness the facts as set forth in the written statement, which I will ask may be treated the same as the preceding statements.

The Court: Yes.

Mr. Crump: The statement to be copied in the record.

(The statement deemed read into the record is as follows:)

“We offer to prove by this witness the following facts:

“Index Mutual Association has sufficient storage capacity in its lemon packing house at La Habra, Orange County, California, for about 35 cars of lemons, which was sufficient storage to enable it to operate economically and successfully under the method of operation in effect prior to Order No. 53. [184]

“In order to operate under Order No. 53 it is necessary for this association to have additional storage of at least 15 cars. The expense of additional construction and installation made necessary by Order No. 53 will be approximately \$10,000.

“Additional storage is required to operate under Order No. 53 because at certain periods of the year lemon picks of growers whose lemons are handled by Index Mutual Association are much heavier than at other times, and the amount of fruit which the association is permitted to ship under Order No. 53 is not suffi-

(Testimony of G. E. Estabrook.)

cient to take care of all marketable fruit being picked, or of all marketable fruit for which orders have been received.

“Under Order No. 53 it is necessary to keep lemons in storage for a longer period of time than it was previously necessary to keep them. The keeping of lemons in storage for a longer period of time than it was customary or necessary under the marketing methods used before Order No. 53 became effective, which marketing methods were modern and efficient—has resulted in deterioration in much of the fruit before it could be shipped.

“While dark green lemons will keep in storage six months, it is advisable to ship them within three or four months in order that they may reach the consumer while the fruit still has plenty of life left in it. If dark green lemons are shipped, that is to say, lemons which are dark green when picked, after being in storage for six months, there is little life left in them when they reach the consumer. When we refer to ‘consumer’ and ‘market’, we are referring to lemons which are shipped in interstate commerce and not those consumed locally [185] in the State of California.

“Index Mutual Association is a cooperative marketing corporation, engaged in the business of packing and selling lemons and other citrus fruits through Mutual Orange Distributors in

(Testimony of G. E. Estabrook.)

interstate commerce. It handles lemons for approximately 32 lemon growers having a producing acreage of approximately 207 acres in California.

“Lemons can only practically and economically be packed and shipped in less than carload lots when shipped with other citrus fruits, which frequently cannot be done. Index Mutual Association cannot compete successfully with other handlers, or compete with other handlers at all, if it is not permitted to pack and ship at least three carloads at a time, and frequently it is necessary to pack at least four or five carloads at a time, depending upon sizes and grades of lemons on hand and the market demand.

“When limited in our shipments, as we have been under Order No. 53, there have been many times when we have not been able to pack and ship even one carload of lemons, nor to pack and ship the number of cars necessary in order to operate on a sound, economical or practical basis, with resulting loss of fruit and of profit to our growers, by reason of the necessity of rehandling fruit, and because of increased deterioration and decay.

“In packing lemons for market, we first take a storage box and dump the contents onto a moving belt, and from there on to a conveyor, into the waxing machine. From the waxer the

(Testimony of G. E. Estabrook.)

fruit goes onto a grading table, and all sizes and grades in the storage box go onto this table. They are there separated according to grades, [186] standards and third grade fruits and culls being taken out first and sent to by-products; choice, or second grade, is put on another moving belt, and fancy, or first grade, is permitted to go through on the original belt. Both first and second grade fruit is packed, and ordinarily all sizes are packed.

“As the lemons come from the grader onto the packing belt they are packed, but it is not practicable in order to fill an order for 300’s and larger first grade lemons, to pack only those grades and sizes, for the reason that the fruit which did not meet the requirements would have to be put back in storage and re-handled, which increases decay and deterioration, with a consequent loss of market value, and this also adds to the expense of handling.

“Before we were compelled by Order No. 53 to change our packing and shipping methods, none of the fruit sent over the grader was returned to storage. Since the operation of Order No. 53 there have been times when this association has been compelled to return to storage as much as 30 per cent of the fruit passing over the grading belt, which would normally have been packed and shipped. Of this fruit returned to storage, a large part

(Testimony of G. E. Estabrook.)

which would otherwise be merchantable, either has to be sent to by-products or decays before it can be shipped. There is also a shrinkage in the weight and size of this fruit because of prolonged storage, which proportionately decreases the returns to the growers. The re-handling of lemons more than doubles the handling cost.

“Order No. 53 has compelled us to keep our fruit in storage beyond the time when it was in the best condition to market and would bring the best prices. Under [187] the operation of this Order the growers whose lemons are handled by Index Mutual Association have made, and will make less money than they would have made, or would make if there were no such limitation on shipments.

“The percentage of fruit sent to by-products and eliminated has substantially increased since June 1, 1941, by reason of the inability of this association to sell and ship its fruit, occasioned by the small allotments allowed it and the limitation on its shipments under Order No. 53. It was compelled to send to by-products or dump at least eight carloads of merchantable lemons, which it could and would have sold in the regular course of business between June 1, 1941, and August 31, 1941. Lemons dumped were a total loss to the growers, and the best price obtainable from lemons sent

(Testimony of G. E. Estabrook.)

to by-products was less than the cost of production.

“Index Mutual Association, through Mutual Orange Distributors, its selling agent, has built up an interstate trade over a period of many years, with regular customers, who prefer the fruit handled by this and other associations affiliated with Mutual Orange Distributors, and whose trade has become familiar with the trade and brand names of the lemons handled by this association.

“In order to fill orders of these customers it is necessary that shipments move to market in accordance with their demands. In order to supply the demand of these customers, this association must know several weeks, and sometimes months, in advance, the volume it is going to be able to supply. This type of operation is radically different from sales at auction.

“Following the effective date of Order No. 53, the Secretary of Agriculture, acting upon the recommenda- [188] tions of the Lemon Administrative Committee, for the weekly period beginning June 1, 1941, fixed the allotment of this association for lemons which it was permitted to handle in the current of interstate commerce at 726 packed boxes.

“Similarly for the week beginning June 8, 1941, the allotment of this association was fixed at 642 packed boxes, which was subse-

(Testimony of G. E. Estabrook.)

quently changed to 419 packed boxes by deducting 223 boxes for alleged over-shipment.

“Similarly for the week beginning June 15, 1941, the allotment of this association was fixed at 561 packed boxes, which allotment was subsequently adjusted to 574 packed boxes because of an alleged under-shipment of 5 boxes and loans paid back of 8 boxes.

“Similarly for the week beginning June 22, 1941, the allotment of this association was fixed at 713 packed boxes, which was subsequently changed to 662 packed boxes because of an alleged over-shipment of 51 boxes.

“Similarly, for the week beginning June 29, 1941, the allotment of this association was fixed at 572 packed boxes, which was subsequently increased to 667 packed boxes.

“Similarly for the week beginning July 6, 1941, the allotment of this association was fixed at 667 packed boxes, which was subsequently changed to 320 packed boxes because of an alleged over-shipment of 347 boxes.

“Similarly for the week beginning July 13, 1941, the allotment of this association was fixed at 496 packed boxes, which was subsequently changed to 542 packed boxes because of an alleged under-shipment of 46 boxes.

“Similarly for the week beginning July 20, 1941, [189] the allotment of this association was fixed at 439 packed boxes.

(Testimony of G. E. Estabrook.)

“Similarly for the week beginning July 27, 1941, the allotment of this association was fixed at 406 packed boxes, which was subsequently increased to 517 boxes, and then reduced to 134 packed boxes because of an alleged over-shipment of 122 boxes and borrowings paid back of 261 boxes.

“Similarly for the week beginning August 3, 1941, the allotment of this association was fixed at 443 packed boxes, which was subsequently increased to 517 boxes, and again increased to 651 boxes because of an alleged under-shipment of 134 boxes.

“Similarly for the week beginning August 10, 1941, the allotment of this association was fixed at 537 packed boxes, which was subsequently changed to 238 packed boxes, because of an alleged over-shipment of 299 boxes.

“Similarly for the week beginning August 17, 1941, the allotment of this association was fixed at 307 packed boxes, which was subsequently adjusted to 401 boxes, because of an alleged under-shipment of 94 boxes.

“Similarly the Secretary has fixed total quantities and the allotments of this association for each week subsequent to the week ending August 24, 1941, in varying amounts, for which certificates of allotments and certificates of adjusted allotments have been issued by the Lemon Administrative Committee.

(Testimony of G. E. Estabrook.)

“The allotments given Index Mutual Association for each week beginning with June 1, 1941, to and including the week beginning August 17, 1941, as compared to the total quantities permitted to be shipped each week under [190] Order No. 53, are typical of the amount of allotments as compared to total quantities permitted to be shipped during the operation of Order No. 53.

“The natural and necessary result of the limitation of shipments under Order No. 53, insofar as this association is concerned, has been, is, and will continue to be, during the operation of Order No. 53, to require this association to eliminate from interstate fresh fruit trade channels large quantities of merchantable lemons which it could, and otherwise would sell and ship in interstate commerce, at prices which would return a profit to the growers; and Order No. 53, as operated and as intended to operate, has caused, is causing, and will cause the loss of many thousands of dollars to this association and its grower members. This is inherent in, and the necessary result of any limitation on shipments in interstate commerce on the basis of weekly or bi-weekly allotments, and any limitation on quantities which may be shipped, with corresponding prorated allotments to this association, will have the same effect, unless the total quantities

(Testimony of G. E. Estabrook.)

permitted to be shipped under Order No. 53 are fixed by the Secretary of Agriculture for each week in sufficient amounts to permit of a free movement of lemons in interstate commerce, which is contrary to the purpose, intent and theory of Order No. 53.

“Index Mutual Association sells less than 2 per cent of its lemons at auction, and approximately 80 per cent on order. It sells interstate only first grade, or fancy, and choice, or second grade, lemons, which are sold through Mutual Orange Distributors under the respective trade names of ‘Pure Gold’ and ‘Silver Seal’, and under the first grade brand of ‘Index Supreme’ and [191] second grade brand of ‘Goldenrod’.

“In order to return a per box profit to our growers, it is necessary to sell lemons interstate at an average F.O.B. return of \$3.00 per box. The operation of Order No. 53 has substantially increased the cost to the growers whose lemons are handled by Index Mutual Association, and reduced correspondingly their returns. The cost of operation has been increased by the necessity of handling fruit more than once, and the necessity for keeping an operating force on hand, which without the prorated could operate more economically.

“By reason of the limitation on its operations, effected by Order No. 53, Index Mutual Association and its growers have lost and are

(Testimony of G. E. Estabrook.)

losing regular customers, who are compelled to purchase lemons from other handlers, not affiliated with Mutual Orange Distributors.

“The only competitor of Mutual Orange Distributors and its member houses, including this association, with a sufficient volume of lemons and sufficient prorate allotments, and without sufficient private sale outlets to dispose of its lemons otherwise than by auction sales, is California Fruit Growers Exchange, which controls approximately 90% of the total production of lemons in the United States.

“The natural and necessary effect of Order No. 53 is to take away from this association its regular customers and compel its customers to purchase their lemons from California Fruit Growers Exchange. The ultimate effect of Order No. 53 if continued in operation will be to force all handlers out of business, except California Fruit Growers Exchange, and create in that Exchange a complete monopoly in the handling of lemons. [192]

“Said Order will also compel this association to sell a large percentage of its lemons through the auction markets, with a resulting loss of net returns to the growers, for the reason that the limitation of shipments effected by Order No. 53 prevents this association from filling orders, and from advising its regular customers that it will be able to fill their orders.

(Testimony of G. E. Estabrook.)

“About 95% of the fruit sold in interstate at auction is fruit handled by California Fruit Growers Exchange, whose brand and trade names are established on the auctions, and which has developed an auction demand, which enables it to receive higher prices at auction sales than prices which are received by competitors, including this association, whose brand and trade names have not been exploited by means of the auctions. This requires the growers whose lemons are handled by this association, and other handlers not affiliated with California Fruit Growers Exchange, to compete with that Exchange in the sale of lemons to buyers who have purchased from California Fruit Growers Exchange over a period of years, at the same time losing trade outlets which this association and other non-Exchange handlers have developed over a period of years.

“Index Mutual Association began complying with Order No. 53 in the week beginning June 29, 1941.

“On August 11, 1939, this association had 4212 boxes of lemons in storage; on August 9, 1940, it had 2202 boxes in storage; on August 9, 1941, it had 11,653 boxes in storage. This increase in the number of lemons in storage was the direct and necessary result of Order No. 53. Most of the lemons in storage

(Testimony of G. E. Estabrook.)

on August 9, 1941, would have been sold in interstate commerce prior to that [193] date if it had not been for the limitation on shipments of this association, effected by Order No. 53.

“Most of the lemons in storage on August 9, 1941, either had to be dumped by reason of decay and deterioration, or sent to by-products.”

O. W. CAVE

a witness on behalf of defendants, testified as follows:

I am Treasurer-Manager of the Glendora Co-operative Citrus Association, and have been such for six years.

Mr. Crump: At this time we offer to prove by this witness the facts set forth in the affirmative answer of the Glendora Association.

The Court: Read that. What is the point, the same as the others?

Mr. Crump: Similar. I haven't prepared a written statement for this witness, and I am offering to prove by him the facts as set forth in the affirmative answer of the Glendora Association.

The Court: It is similar to the other offers?

Mr. Crump: Yes; only the amounts will be different, and the quantities of allotments.

The Court: Probably you had better state more or less in full what you expect to prove by this witness.

(Testimony of O. W. Cave.)

Mr. Crump: Very well. I expect to prove by this witness the general facts in regard to the industry, as I offered to prove by the other witnesses. And I offer to prove by this witness the amount of allotments and adjusted allotments as set forth in Paragraph 9 of the affirmative answer; that is, the second affirmative defense in the answer of the Glendora Company, and to prove also by him the allegations as set forth in Paragraphs 10 and 11 of the affirmative answer. In connection with the testimony of this witness I also offer in evidence a statement entitled, [194] "Glendora Cooperative Association—Packed box shipments prepared from Pool shipping records," which is similar to the information furnished by other witnesses.

The Clerk: Exhibit J for identification.

(The document referred to was marked "Defendant's Exhibit J for identification.")

C. W. VOLKMER

a witness on behalf of defendants, testified as follows:

I am Manager of the Whittier Mutual Orange and Lemon Association; and have been engaged in that occupation for nine years.

Mr. Crump: Now, I offer to prove by Mr. Volkmer, the manager of the Whittier Mutual Orange and Lemon Association, similar facts as was of-

ferred to be proved by Mr. Cave, including the allegations of Paragraphs 9, 10 and 11 of the answer of the Whittier Mutual Orange and Lemon Association. In that connection, and in connection with that offer of proof I offer a similar statement for the Whittier Association showing packed box disposals, which I will offer as the next exhibit.

The Clerk: Exhibit K for identification.

(The document referred to was marked "Defendant's Exhibit K for identification.")

The two written Stipulations of Facts, hereinbefore set forth in full, (*supra*, p. 146 and p. 147) were then offered in evidence by these appealing defendants, and received in evidence by the Court.

Mr. Crump: That covers our offers at this time.

The Court: Gentlemen, I am going to continue the further hearing of this case until Thursday at 2:00 p.m. There is some [195] question in my mind as to the correctness of my conclusions, insofar as the question of constitutionality is concerned. I have some doubt, and it has been some little time since I have gone over my authorities, and I want an opportunity to recheck. We are getting down to a pretty nice point when you raised the question as to whether or not the question of constitutionality should be raised in this action or in the review, and the court recognizes that it might not be out of place to raise it in this action.

And as I have come to that conclusion I will have to continue the case, then, for the taking of further evidence.

Mr. Weikert then made an offer of proof on behalf of his client, defendant Orange Belt Fruit Distributors, Inc.

The Court (addressing Mr. Weikert): As I understand it, then, the evidence that you desire to offer is evidence that you contend would tend to prove that the workings of the Order by the Committee violated the constitution?

Mr. Weikert: Precisely.

The Court: And, of course, that is the same position that you are taking, is it not, Judge Crump?

Mr. Crump: Yes.

The Court: In other words, you are not attacking the Order itself in this proceeding?

Mr. Crump: I wouldn't say that. We are not attacking the Act, but we are attacking the Order.

The Court: Your offers of proof here are intended to show how the Order has worked out, insofar as your particular clients are concerned?

Mr. Crump: Yes. But I want to make this clear: That we contend that the Order is unconstitutional on its face, because if it operates in accordance with its provisions it is bound to have that effect, and does have the same effect.

The Court: Of course, the question of whether it is uncon- [196] stitutional on its face is a question of law.

Mr. Crump: Well, it is a question of mixed law and fact.

The Court: Well——

Mr. Crump: The reason I say it is a question of mixed law and fact is this: The Court cannot take judicial notice, as I see it, of how an order operates according to its face. That is why I have contended all the time that we were entitled to put in evidence to show the necessary effect of the Order as written.

The Court: By the attack on the order on its face you claim the evidence is admissible to explain——

Mr. Crump: That is it precisely.

The Court: ——explanatory of the order?

Mr. Crump: Precisely.

The Court: And the evidence that you have offered here, and which the Court has refused, you contend tends to establish that?

Mr. Crump: That is right.

The Court: And also tends to establish the fact that the workings of the Order——

Mr. Crump: That is right, but particularly the face. I can understand how, if it is simply that there was some discretion given to the Secretary or the Committee in operating the Order, and they have exercised that discretion in a way which is discriminatory or confiscatory as to these defendants, that we might have to go in and ask the Secretary of Agriculture to change that particular order; I don't mean order No. 53, but the order under 53. Whereas, if the necessary workings of Order No. 53 is going to be confiscatory or discrim-

inatory, then I say we are entitled to introduce that testimony for the purpose of showing that the order on its face is discriminatory and confiscatory, and that any way they operated it is bound to be the same way. [197]

The Court: Now, I would like to ask you your interpretation of Section 608a (6), which reads as follows: (The Court reads said section).

Now, as I understand it, the Government claims that that is a limitation upon the jurisdiction of the Court. Is that your contention?

Mr. Worthington: I think that could be logically argued, your Honor.

The Court: In other words, you claim that Section (6) is a limitation upon the power of the court——

Mr. Worthington: Yes, sir.

The Court: ——to only do specifically the thing that is specified in here?

Mr. Worthington: Yes sir. To prevent violation. And that the remedy, if they have any, is through the Secretary, and upon his refusal to grant relief then to proceed in an entirely different manner in the District Court to review that finding.

The Court: Then, under 608c (15) (B) it says: (The Court here reads section referred to).

Mr. Worthington: Under that section, I think Judge Crump could raise a constitutional question or any other question, that is, questions of law. But under this proceeding here I submit that Congress did not intend for those questions to be raised.

The Court: Of course, the Secretary can't pass on the questions of constitutionality.

Mr. Worthington: No.

The Court: That is out of the purview of his power.

Mr. Worthington: I think that section (6) simply is for the purpose of preventing violations of the Act, and nothing more, so that they will be confined to the remedy that Congress gave them in (15), (A) and (B). Otherwise, Congress would be giving a premium to violators of the Act. [198]

The Court: Have you any authorities that you would like to have me read?

Mr. Crump: I haven't collected them. I think I could get them together, but it will take me a little time. I can probably get them to you by noon tomorrow. But in answer to your question, we take the position that this section, which your Honor referred to that, "The several District Courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement," simply is a grant of power—not a limitation of power—but a grant of power to the court to enforce an order, which necessarily means of course a valid order.

The Court: Well, do we need an act of Congress to give us the power to enjoin the violation?

Mr. Crump: I am not so sure that you would. But, nevertheless, there might perhaps have been a question as to the authority of the United States

District Courts to enforce such a provision pending a ruling by the Secretary under (15), (A); in view of the fact (14) (608c) provides that there shall be no penalties for over-shipments while that application is pending. In other words, unless this provision were in there, we have the other provision that no penalties shall attach for violations of the order while an application for review is pending before the Secretary; I think there would be a very decided question whether the courts could restrain the violations of the order pending a ruling of the Secretary. But in any event, it seems to me that this simply is a provision that the District Courts have power to enforce, by way of injunction and order, which necessarily means a valid order, because if the order is not valid it is no order.

The Court: It says here, (608c) (15), "After such hearing the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law." [199]

Doesn't that carry with it the assumption that if there had been no petition for review it would become final, providing the order was in accordance with law?

Mr. Crump: Yes.

The Court: If you have a hearing on your complaint in equity for review and the Court upholds the Secretary, he can only uphold in the event the order was in conformity with law, can't he?

Mr. Crump: Yes. Suppose we didn't ask for any review at all, and this question came up; we didn't

have any review pending at all; certainly no order can be enforced unless it is a constitutional order, because the order cannot rise higher than its source.

Mr. Worthington: That being the case, the obvious conclusion is that it pays for these defendants to proceed in a disorderly manner and violate the order, whether they think it unconstitutional or not, and receive a premium for it, instead of proceeding as Congress stated they should proceed if they didn't think the order was proper.

The Court: If the order is void of its constitutional right it is a nullity.

Mr. Crump: Yes, and Congress didn't add anything to it by an Act of Congress.

The Court: No.

Mr. Crump: Congress can't add anything to it. If it violates the constitution it violates something that is ahead of and takes precedence over any Act of Congress.

The Court: Gentlemen, I am going to continue this matter until 2:00 p.m. Thursday, and if between now and tomorrow noon either side desires to submit any points and authorities, I would be glad to receive them. Now, any points and authorities that are submitted I want to be confined to this one point: That is the question as to whether or not, in such a proceeding as this, such [200] defendants as are involved in these cases can, at any stage of the proceedings, raise the constitutional question, and whether or not it is incumbent upon this court to determine that issue before granting an injunction.

Now, to my mind that is the gist of the action.

The trial was resumed Thursday, April 2, 1942, at which time the following proceedings were had.

After a short argument by Mr. Crump on behalf of the defendants represented by him, the Court announced its opinion, as follows:

OPINION OF THE COURT

I have a little memorandum made up so you will be clear as to the Court's position in the matter.

The Government in these consolidated cases is attempting to enjoin the over-shipment of lemons in violation of established prorate orders, issued in pursuance to Order No. 53, made by the Secretary of Agriculture.

The admissions in the answers, together with the stipulations of the parties, establish the fact that said defendants have violated the prorate order issued in pursuance to said Order, and it is clear that the Government is entitled to the relief sought, unless the Court should find in favor of the Defendants under their special defenses. These special defenses attempt to bring into issue the legality of said Order No. 53.

The defendants claim that said Order is arbitrary, unreasonable, unjust, and discriminating, and violative of their constitutional rights. The defendants have offered evidence in support of said affirmative defenses, and the sole question now before the Court is a determination of the admissibility of this [201] evidence.

I am of the opinion that such evidence is not admissible. The actions are brought pursuant to the provisions of Title 7, Section 608a(6) U. S. C. A., which provides as follows:

“The several District Courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore, or hereafter made, or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said Courts.”

I believe it was the intention of Congress under said provision to limit the jurisdiction of the District Court, to enforce and prevent violations of any order, regulation, or agreement made or issued pursuant to the Agricultural Adjustment Act. I believe the use of the word “specifically” has a special significance, and limits this Court’s jurisdiction to the precise things therein designated. I feel that said section is a limitation upon rather than a grant of power.

The Act provides for a complete administrative remedy. Section 608c (15) provides as follows:

“Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, and praying for a modification thereof, or to be exempted therefrom. He shall

thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing the Secretary shall make a ruling upon the prayer [202] of such petition which shall be final, if in accordance with law.

“The District Courts of the United States (including the District Court of the United States for the District of Columbia) in any District in which such handler is an inhabitant, or has his principal place of business, are hereby vested with the jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within 20 days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the Court determines that such is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) To make such ruling as the Court shall determine to be in accordance with law, or (2) To take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this Subsection (15) shall not impede, hinder, or delay the United States, or the Secretary of Agriculture from obtaining relief pursuant to Section 608a(6) of this Title. Any proceedings brought pursuant to Section

608a(6) of this Title (except where brought by way of counterclaim in proceedings instituted pursuant to this Subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).”

You will note that this section specifically provides [203]

“If the Court determines that such ruling is not in accordance with law.”

Well, of course, if it is violative of any constitutional right, it is not in accordance with law, and it seems to me that it is clear under that section that it is going to be incumbent upon the Court to determine the lawfulness of the Order.

The defendants have all filed their petitions with the Secretary of Agriculture in pursuance to such section. Some of the petitions have been dismissed, and bills in equity are now pending seeking a review of such rulings. The balance of said petitions are now pending before the Secretary of Agriculture.

It is a cardinal principle of administrative law, that the administrative remedy must be followed and judicial relief will not be granted before the prescribed administrative remedy has been exhausted.

I am satisfied the following authorities support my view: *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375; *Myers v. Bethle-*

hem Shipbuilding Corporation, 303 U.S. 41; Rochester Telephone Co. v. United States 307 U.S. 125 and United States v. Superior Court recently decided by the Supreme Court of the State of California. The exact designation of the citation I have not before me.

It further appears to me that the Act provides for an exclusive remedy of review, which excludes all other judicial intervention. (National Labor Relations Board v. Jones & McLaughlin, 301 U.S. 1).

If I am correct in my viewpoint, the legality of the Order can only be questioned in a District Court under the provisions of said Section 608c (15).

Such a ruling will not work an undue hardship upon the defendants inasmuch as they are now pursuing their administrative remedy, and when the matter is presented to the District Court, they [204] then can present their attacks on the lawfulness of said Order No. 53.

If the Court agrees with the contentions, any action taken pursuant to said Order will be abated. On the other hand, if the Court upholds the Secretary of Agriculture, said Order No. 53 will become final.

Let us for a moment analyze the contentions of the defendants. If their theory is to prevail, they can, in this action, in effect annul said Order No. 53. A judgment denying the Government injunctive relief would have that effect and said Defendants, with impunity could ignore their administra-

tive remedy and to so hold would in effect grant to the defendants judicial relief prior to the exhaustion of their administrative remedies.

Furthermore, such a holding would, in effect, permit this Court to try the issues presented to the Secretary of Agriculture, and any judgment by this Court would be a substitution of my opinion for that of the Secretary of Agriculture, which would be in direct conflict with the legislative intent.

I believe *Railroad Commission v. Rowan and Nichols Oil Company*, 310 U.S. 573—311 U.S. 570 support me in that contention.

It would also grant to said defendants an advantage not afforded to others. If the defendants had voluntarily complied with the order and then pursued their administrative remedy, they would be restricted to a judicial review as provided in said Section 608c(15), but as a reward for their non-compliance with the order they contend the legality of the Order may now be determined by this Court.

I do not feel any such discrimination should be made in favor of the wrong-doer. Familiar rules of equity should withhold this Court's favor in this respect.

Insofar as the defendants raising the issue that the Act does [205] not apply to second handlers, I adhere to my former rulings. I do not believe that the Act or the Order makes any such distinction. Any such holdings would allow a complete circumvention of the Act and the Order.

The thought I have in mind, gentlemen, is that the findings be limited to the facts of the Order and the non-compliance and the injunction prohibiting the violation of Order No. 53. I would have no objection to the findings in a case reflecting that the defendants are pursuing their administrative remedy and that, if the judgment in the administrative proceedings was in favor of the defendants, such judgment would, in effect, abate the order here, such final judgment.

I would like, Judge Crump, to have counsel see if they cannot agree on findings, and if you cannot agree, we will arrange for a conference for the purpose of thrashing out those things.

But it is not my intention, by granting this injunction, to preclude the defendants from raising every issue that they are entitled to raise in their review proceedings.

I look upon this proceeding of the Government as an interim proceeding in a way. That is, as I view the Act, those affected by it have their administrative remedy, but Congress realizing the delays that occur by reason of those petitions for hearing before the Secretary of Agriculture and then the Court proceedings, that there is going to be a great delay and that to enforce the Order pending such proceeding, it has provided for this one section that gives the District Court jurisdiction. It might have been an improvement in the Act if it had provided that a temporary restraining order would be issued which shall be held in abeyance until the administrative remedy had been exhausted, but I

look at this this way, and, as I have said, assume, Judge Crump, that your clients had voluntarily complied with this Order and still were dissatisfied and had filed their petition for review with the Secretary of Agriculture [206] and then their bill in equity in this Court upon refusal of the Secretary to grant you any relief: Now certainly you would have the right under such conditions to raise any point, particularly your point of constitutionality.

Now I don't believe that because Congress gave the District Court power to enforce the Order that it intended to give those that did not comply with the Order a broader right of review and a greater scope of judicial action than the man that complied with it, and certainly there is a method of reaching the legality of this Order and the Act itself provides definitely that when the ruling of the Secretary becomes final, it shall be final if in accordance with law.

Now, of course, it seems to me that that language, "If in accordance with law" might be considered as surplusage because any order he makes in violation of the law, there would be a way of reaching it, but I believe that it is primarily the problem of the Court that reviews the action of the Secretary of Agriculture.

The Government, under my statement, of course, is entitled to an injunction in these cases, and I shall expect them to expeditiously prepare the findings, serve them, and submit them to me and try to settle this in the next few days.

This concluded the proceedings at the trial in said consolidated cases. [207]

DEFENDANTS' EXHIBITS OFFERED AND
MARKED FOR IDENTIFICATION BUT
EXCLUDED FROM THE EVIDENCE BY
THE TRIAL COURT.

Defendants' Exhibits "A" to "K", both inclusive, offered in evidence by these appealing defendants and marked for identification, in connection with the offers of proof made by said defendants at the trial, as hereinbefore referred to in the "Proceedings at the Trial", (all of which were excluded by the Court), were and are in the words and figures following, to-wit: [208]

DEFENDANTS' EXHIBIT "A" FOR
IDENTIFICATION

November 19, 1941

To All Handlers of Lemons:

A copy of the Marketing Policy Statement as submitted to the Secretary of Agriculture on November 15, 1941, is hereby presented to you as required under Section 4 (a) of the Marketing Agreement:

"In presenting its Marketing Policy Statement for the ensuing year, Lemon Administrative Committee wishes to review, for your perusal, the operations of this program since the week commencing June 1, 1941 as same refers to weekly industry

shipments interstate, and weekly f.o.b. prices in contrast with comparable data for the previous year and the average for the three prior years:

Week Ending	Interstate Industry Shipments			Average F.O.B. Price		
	1941	1940 c a r s	3 Yr. Avge. 1938-1940	1941	1940	3-Yr. Avge 1938-1940
				dollars per box		
June 7	683	594	627	3.43	3.01	3.17
14	642	675	613	3.05	3.52	3.32
21	586	708	611	2.89	3.55	3.24
28	731	558	583	3.55	3.13	3.12
	<hr/> 2,642	<hr/> 2,535	<hr/> 2,434			
July 5	717	307	410	4.65	2.73	2.96
12	707	435	615	3.74	2.71	3.21
19	655	404	450	3.16	2.53	3.03
26	577	642	476	3.17	3.75	3.15
	<hr/> 2,656	<hr/> 1,788	<hr/> 1,951			
Aug. 2	705	716	519	4.04	6.17	4.00
9	705	404	417	4.75	4.22	3.49
16	677	377	374	3.97	3.55	3.42
23	397	368	328	2.91	3.27	3.48
30	268	288	321	2.32	2.86	3.17
	<hr/> 2,752	<hr/> 2,133	<hr/> 1,959			
Sept. 6	146	227	205	2.33	2.75	2.94
13	257	206	228	2.40	2.51	2.96
20	242	129	196	2.85	2.31	2.87
27	303	118	152	3.26	2.32	2.83
	<hr/> 948	<hr/> 680	<hr/> 779			
Oct. 4	256	191	163	3.40	2.57	2.71
11	251	230	195	3.13	2.81	2.81
18	245	208	175	3.22	2.83	2.83
25	277	200	183	3.11	2.60	2.90
	<hr/> 1,029	<hr/> 829	<hr/> 716			
Nov. 1	268	218	180	3.04	2.51	2.91
	<hr/> <hr/> 10,295	<hr/> <hr/> 8,183	<hr/> <hr/> 8,019			

As to the distribution of the crop during the same period, we offer also, the following performance record:

	Shipments June 1, 1941 to November 1, 1941, inc. Cars	Percentage Distribution to November 1, 1941
Interstate	10,295.02	50.92
Intrastate	1,089.33	5.39
Export	55.50	.27
By-Product	7,732.92	38.25
Eliminated	1,044.58	5.17
Total.....	20,217.35	100.00

[208-a]

The objectives of this Committee shall be directed toward attaining such results as are prescribed in the Marketing Agreement and Order with particular reference to so recommending the regulation of shipments, when necessary, that the returns to lemon growers will tend to approach parity, at the same time giving due consideration to the interests of the consumer.

Lemon Administrative Committee believes that the desired results may be obtained through regulation of shipments, giving careful consideration to the interrelationship of the primary factors which affect the price and income for lemons, namely; available market supply, consumer income, and weather conditions.

Further, the Committee will consider at all times the additional consumptive demand for lemons which may be created by increased sales effort on the part of the industry, through more intensive advertising and merchandising programs.

Approximately 9,200,000 boxes of fresh lemons were sold in the season just ended as compared with 7,807,000 boxes in 1940, and a three year average of 7,719,000 boxes. It is believed that the sale of this record volume of lemons was made possible by virtue of the following factors: A regulated flow of lemons to market, summer temperatures which were 2 degrees above normal, and an increase of 21 points in the index of non-agricultural income. Preliminary data on the average f.o.b. price received for packed and loose lemons during last season indicate a figure of about \$2.94 per box.

For the 1941-42 season it is estimated that, assuming normal summer temperatures (as compared with 1940-41 summer temperatures which were 2 degrees above normal) and a further rise of 13 points in the index of non-agricultural income, not less than 9,000,000 boxes of lemons may be sold in fresh fruit channels at a price approaching parity.

The official government forecast of the 1941-42 lemon crop, as of November 1, 1941 indicates production of 14,580,000 boxes. If we may assume this estimate to be reasonably accurate, the industry is faced with a crop considerably in excess of the quantity which it is felt can be marketed in fresh fruit channels during said year at reasonable prices.

Based upon this early season estimate, the following utilization schedule for the 1941-42 lemon crop is indicated:

	1,000 Boxes	Percent
Tree crop	14,580	100.0
Dom. and Canadian fresh shipts.	8,970	61.5
Exports other than Canada.....	30	.2
By-Products and Cullage.....	5,580	38.3

In conclusion, it may be stated that this Committee will endeavor to develop and maintain a shipping program which, under normal conditions will approach parity for the season as prescribed by the Agricultural Marketing Agreement Act, and which also recognizes fairness and adequate supplies to the consumers of lemons.”

Yours very truly,

LEMON ADMINISTRATIVE
COMMITTEE

By R. L. MacRAE

Assistant Secretary. [208-b]

DEFENDANTS' EXHIBIT B

EFFECT OF MARKETING POLICIES ON RETURNS OF
10 ACRE LEMON GROVE

10 Acre Grove

4330 Field Boxes (average yield on 5 year basis) @ 50#
per Field Box
-216 5% eliminated

4114 Field Boxes

½ of Crop Packed and Shipped:

1353 packed boxes @ 76# to packed box
Delivered Price\$ 4.50 \$ 6,088.50
Costs 3.34 4,519.02

Net Returns \$ 1,569.48

Effect of Marketing Policies on Returns of 10 Acre Lemon
Grove—(Continued)

½ of Crop Diverted to By-Products:

2057 field boxes (based on \$20 per ton) @ 50c
\$ 1,028.50

Costs:

cultivation\$.542
picking and
hauling242
packing house
costs200

Total Costs984 \$ 2,015.86

Net Loss \$ -987.36

Total \$ 582.12

Cost of eliminated Fruit

216 Field Boxes @ \$.98..... \$ -211.68

Net for Crop..... \$ 370.44

10 Acre Grove

4330 Field Boxes (average yield on 5 year basis) @ 50#
per Field Box.

-216 5% eliminated

4114 Field Boxes

¾ of Crop Packed and Shipped:

2030 packed boxes @ 76# to packed box

Delivered Price\$ 4.10 \$ 8,323.00

Costs 3.34 -6,780.20

Net Returns \$ 1,542.80

¼ of Crop Diverted to By-Products:

1028 Field Boxes @ 50c (based on \$20 per ton)

\$ 514.00

Costs\$.98 1005.48

Net Loss -491.48

Total \$ 1,051.32

Effect of Marketing Policies on Returns of 10 Acre Lemon
Grove—(Continued)

Cost of eliminated Fruit:		
216 Field Boxes @ \$.98.....		211.68
Net Income for Crop.....		\$ 839.64
		[208-c]
4330 Field Boxes (average yield on 5 year basis) @ 50# per Field Box		
-216 5% eliminated		
4114 Field Boxes		
90% of Crop Packed and Shipped:		
2436 packed boxes @ 76# per packed box		
Delivered Price\$ 4.00	\$ 9,744.00	
Costs	3.34	8,136.24
Net Returns		\$ 1,607.76
10% of Crop Diverted to By-Products:		
411 field boxes @ \$.50 (based on \$20 per Ton)		
	\$ 205.50	
Costs	\$.98	402.78
Loss on Crop		-197.28
Total Returns		\$ 1,410.48
Cost of Eliminated Fruit of		
216 Field Boxes @ \$.98 per box		211.68
Net Income for Crop.....		\$ 1,198.80

CALIFORNIA CITRUS LEAGUE FIGURES

	* * * *	* * * *
	Packed Box	Field Box
Cultural .....	.824	.542
Pick .....	.321	.211
Haul .....	.047	.031
Packing .....	.782	.200
Selling .....	.168	x
Freight	1.200	x
	<hr/>	<hr/>
	\$3.342	\$.984

California Citrus League Figures—(Continued)

Cultural Costs per 10 acres.....\$2,347.20

Field boxes to carry cost.

4330 avg. cost per fb.. .542

Costs converted to packed box:

50 lb. loose—76 lb. packed=.824

per packed box.

By-Products:

\$20.00 per Ton, — 40 Field Boxes

per ton @ \$.50 per Field Box.

[208-d]

DEFENDANTS' EXHIBIT C

LEMON SHIPMENTS

June 1, 1941, to November 1, 1941

DISTRIBUTION	INDUSTRY		* * *		M.O.D. (ACTUAL)		M.O.D. (WOULD HAVE) *	
	Cars	Percent	Percent	Cars	Percent	Cars	Percent	
Interstate	10,295.02	50.92		594.65	55.37	505.65	47.08	
Intrastate	1,089.33	5.39		83.49	7.77	98.99	9.22	
Export	55.50	.27		1.53	0.14	1.81	0.17	
By-Products	7,732.92	38.25		370.13	34.47	438.84	40.86	
Eliminated	1,044.58	5.17		24.20	2.25	28.71	2.67	
Total.....	20,217.35	100.00		1,074.00	100.00	1,074.00	100.00	

*If M.O.D. had not overshipped, based on the proportions M.O.D. Moved in non-prorated channels, M.O.D. movement would have been as shown.

(Source of date: Lemon Administrative Committee)

[208-e]

Defendants' Exhibit D—(Continued)

SUMMARY OF COPY OF SHIPPERS' PERFORMANCE RECORD

Handler: Mutual Orange Distributors

Reg. #	Date Week Ending	Certificate of Allotment		Certificate of Adj. Allotment		Total Packed Boxes		Over Shipped Pkd. Boxes		Under Shipped Pkd. Bxs.		Forfeits Pkd. Bxs.		By-Products Packed Boxes		Amount of Violation Pkd. Bxs.	
		Boxes	Cars	Boxes	Cars	Boxes	Cars	Boxes	Cars	Boxes	Cars	Boxes	Cars	Boxes	Cars	Boxes	Cars
1.	6-7-41	12,738	31.37	12,738	31.37	22,763	56.1	10,025						5,346	13.2	8,460	20.8
2.	6-14	11,269	27.76	9,704	23.90	24,509	60.4	14,805						7,114	17.5	13,828	34.1
3.	6-21	9,754	24.02	8,784	21.64	17,449	43.0	8,665						6,905	17.0	6,466	15.9
4.	6-28	12,414	30.58	10,215	25.16	15,870	39.1	5,655						6,721	16.6	5,325	13.1
5.	7-5	11,631	28.65	11,294	27.82	13,556	33.4	2,262						7,201	17.7	2,168	5.3
6.	7-12	11,631	28.64	11,868	29.23	11,947	29.4	79				105		7,961	19.6		
7.	7-19	10,625	26.17	10,154	25.01	10,234	25.2	80				52		4,977	12.3		
8.	7-26	9,399	23.15	9,223	22.72	8,989	22.1			234		101		9,846	24.3		
9.	8-2	12,911	31.80	13,041	32.12	13,084	32.2	43				112		8,047	19.8		
10.	8-9	12,911	31.80	14,046	34.60	14,514	35.7	468				406		5,779	14.2		
11.	8-16	14,992	36.93	14,258	35.12	13,579	33.4			679		10		4,065	10.0		
12.	8-23	8,567	21.10	9,058	22.31	9,126	22.5	68				9		3,939	9.7		
13.	8-30	5,752	14.17	5,758	14.18	6,128	15.1	370				28		6,565	16.2		
14.	9-6	3,451	8.50	2,871	7.07	2,483	6.1			388		83		7,164	17.6		
15.	9-13	6,465	15.92	6,628	16.33	7,003	17.2	375				18		8,107	20.0		
16.	9-20	6,465	15.92	6,065	14.94	6,350	15.6	285				43		8,576	21.1		
17.	9-27	7,920	19.51	7,258	17.88	7,499	18.5	241				27		6,912	17.0		
18.	10-4	6,601	16.26	6,125	15.09	7,561	18.6	1,436				4		10,538	26.0		

Defendants' Exhibit D—(Continued)
Summary of Copy of Shippers' Performance Record—(Continued)

Handler: Mutual Orange Distributors—(Continued)													
Reg.#	Date Week Ending	Certificate of Allotment Pkd. Bxs.		Certificate of Adj. Allotment Pkd. Boxes		Total Packed Boxes		Over Shipped Pkd. Boxes	Under Shipped Pkd. Bxs.	Forfeits Pkd. Bxs.	By-Products Packed		Amount of Violation Pkd. Bxs.
		Boxes	Cars	Boxes	Cars	Boxes	Cars				Boxes	Cars	
	19. 10-11	6,578	16.20	5,339	13.15	5,594	13.8	255		7	4,646	11.4	
	20. 10-18	6,578	16.20	6,391	15.74	6,706	16.5	315		10	9,625	23.7	
	21. 10-25	7,595	18.71	8,366	20.60	8,876	21.9	510		2	5,716	14.1	
	22. 11-2	7,595	18.71	7,904	19.46	7,609	18.7		295		4,522	11.1	
Totals.....		203,842	502.07	197,088	485.44	241,429	594.5	45,937	1,596	1,017	150,272	370.1	36,247 89.2
Summary:		Interstate		241,429	55.37%								
	Interstate			33,900	7.77%								
	Exports			625	.14%								
	By-Products			150,272	34.46%								
	Eliminated			9,826	2.26%								
Total:				436,052	100.00%								

Defendants' Exhibit D—(Continued)
COPY OF SHIPPERS' PERFORMANCE RECORD

Handler: Whittier Mutual Orange & Lemon Association

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits# Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-7-41	522	522	586	64			
2.	6-14	462	406	406				
3.	6-21	389	381	1,408	1,027			-621
4.	6-28	495	89	964	875			-875
5.	7-5	421	421			421		
6.	7-12	421	842	842				
7.	7-19	354	354	406	52			
8.	7-26	313					21	
9.	8-2	403	664	550		114	388	
10.	8-9	404	518	518			12	
11.	8-16	477	477	403		74	251	
12.	8-23	273	402	397		5	5 # 263	
13.	8-30	166	111			111		
14.	9-6	100	111	104		7	7 # 171	
15.	9-13	188	200	200				
16.	9-20	188	276	276				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Whittier Mutual Orange & Lemon Association—(Continued)		Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits, $\frac{\$}{\#}$ Pkd. Bxs.	Amount of Violation Pkd. Bxs.
Reg. #	17.	9-27	214	214	406	192		1,159	
	18.	10-4	179	-13				62	
	19.	10-11	140	127	127			98	
	20.	10-18	140	140	406	266		181	
	21.	10-25	121	-145					
	22.	11-1	121	-24					
Totals.....		6,491	6,076	7,999	7,999	2,476	732	12 # 2,872	1,496
Summary:		Interstate	7,999	7,999	69.45%				
		Interstate	148	148	1.29%				
		Exports	158	158	1.37%				
		By-Products	2,872	2,872	24.94%				
		Eliminated	340	340	2.95%				
Total:			11,517	11,517	100.00%				

Defendants' Exhibit D—(Continued)
Copy of Shippers' Performance Record—(Continued)

Handler: Index Mutual Association

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-7-41	726	726	949	223		845	
2.	6-14	642	411	406		5	113	
3.	6-21	561	574	625	51		259	
4.	6-28	713	662	2,388	1,726		139	1,726
5.	7-5	667	667	1,014	347		254	
6.	7-12	667	320	274		46		
7.	7-19	496	542	496		46	46*	
8.	7-26	439	700	822	122			
9.	8-2	517	134			134	153	
10.	8-9	517	651	950	299		65	
11.	8-16	537	238	144		94		
12.	8-23	307	401	525	124		56	
13.	8-30	204	80			80	178	
14.	9-6	122	202	202			103	
15.	9-13	230	230	476	246		268	
16.	9-20	230	-16				314	
17.	9-27	280	264	256		8	370	

vs. United States of America

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Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Index Mutual Association—(Continued)

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
18.	10-4	233	241	604	363		321	
19.	10-11	229	-134				351	
20.	10-18	229	95	95			225	
21.	10-25	239	239	639	400		486	
22.	11-1	239					177	
Totals.....		9,024	7,227	10,865	3,901	413	46*	1,726
Summary:								
Interstate			10,865	49.29%				
Interstate			4,764	21.61%				
Exports			200	0.91%				
By-Products			4,677	21.22%				
Eliminated			1,535	6.97%				
Total			22,041	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Glendora Co-Operative Citrus Asso.

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-07-41	288	288	1,070	782		341	376
2.	6-14	255	-151	786	786		320	786
3.	6-21	217	66	1,005	939		292	533
4.	6-28	276	-130	0			205	
5.	7-05	200	70	0		70		
6.	7-12	200	270	236		34	34*	
7.	7-19	142	142	67		75		
8.	7-26	126	201	0		201	75*	79
9.	8-02	140	266	291	25		67	67
10.	8-09	139	114	104		10	67	
11.	8-16	128	138	104		34	170	10*
12.	8-23	73	42	41		1	78	1*
13.	8-30	77	132	104		28	90	28*
14.	9-06	46	46	48	2		60	
15.	9-13	120	118	104		14		
16.	9-20	120	134	104		30	14*	

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Reg.#	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
Handler: Glendora Co-Operative Citrus Asso.—(Continued)								
17.	9-27	158	174	174	0	0	112	
18.	10-04	132	132	128		4	266	
19.	10-11	140	144	128		16	4* 283	
20.	10-18	140	152	144		8	8 256	
21.	10-25	188	188	192	4		162	
22.	11-01	188	184	128		56	132	
Totals	.....	3,493	2,720	4,958	2,538	581	174* 2,980	1,695

Summary:	Interstate	4,958	51.98%
	Intrastate	1,006	10.55%
	Exports	245	2.57%
	By-Products	2,980	31.24%
	Eliminated	350	3.66%

Total 9,539 100.00%

Defendants' Exhibit D—(Continued)
Copy of Shippers' Performance Record—(Continued)
Handler: Upland Orchards

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-07-41	124	124	1,724	1,600		264	1,194
2.	6-14	110	-296	2,072	2,072		631	2,072
3.	6-21	65	-231	0				
4.	6-28	81	-150	0			12	
5	7-05	53	-97	0				
6.	7-12	53	0	0				
7.	7-19	55	55	0		55	190	
8.	7-26	49	60	406	346			
9.	8-02	88	-258	0				
10.	8-09	88	-170	0				
11.	8-16	85	-85	0				
12.	8-23	49	-36	0			39	
13.	8-30	34	-2	0				
14.	9-06	20	18	0		18		
15.	9-13	26	44	0		44		18*
16.	9-20	26	52	0		52		26*

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Upland Orchards—(Continued)

Reg.#	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
17.	9-27	4	30			30	26*	
18.	10-04	3	7			7	4*	
19.	10-11	2	5			5	3*	
20.	10-18	2	4			4	2*	
21.	10-25						2*	
Totals		1,017	-926	4,202	4,018	215	81	3,266
Summary:		Interstate	4,202	68.46%				
		Intrastate	788	12.84%				
		Exports	12	—				
		By-Products	1,136	18.70%				
		Eliminated	x	x				
Total			6,138	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Ventura County Orange & Lemon Asso.

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-07-41	3,251	3,251	3,394	143		826	
2.	6-14	2,876	2,733	6,293	3,560		1,551	3,560
3.	6-21	2,802	2,802	5,278	2,476		2,203	2,070
4.	6-28	3,567	3,161	2,880		281	3,884	
5.	7-05	3,300	3,581	3,654	73		3,882	
6.	7-12	3,300	3,227	3,050		177	1,820	
7.	7-19	3,088	3,265	3,293	28		689	
8.	7-26	2,731	2,703	2,626		77	3,340	
9.	8-02	3,729	1,370	1,464	94		1,610	
10.	8-09	3,729	4,910	4,504		406	1,300	
11.	8-16	4,704	4,647	4,822	175		717	
12.	8-23	2,688	3,731	3,700		31	695	
13.	8-30	1,638	1,669	1,982	313		2,135	
14.	9-06	983	670	264		406	270	
15.	9-13	1,809	1,899	1,899	0	0	1,131	
16.	9-20	1,809	2,125	2,216	91		1,587	

vs. United States of America

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Ventura County Orange & Lemon Asso.—(Continued)

Reg.#	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
17.	9-27	2,325	2,234	2,182		52		
18.	10-04	1,938	1,990	2,245	255		2,763	
19.	10-11	1,877	1,624	1,624	0	0	1,108	
20.	10-18	1,877	2,281	2,293	12		1,542	
21.	10-25	2,131	2,540	2,540			1,819	
22.	11-01	2,131	2,550	2,550			867	
Totals	.....	58,283	58,963	64,753	7,220	1,430	406*	5,630
Summary:	Interstate		64,753	53.26%				
	Intrastate		20,348	16.74%				
	Exports		x	x				
	By-Products		35,739	29.40%				
	Eliminated		739	.60%				
Total	.....		121,579	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Orange Mutual Citrus Association

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits [#] Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-7-41	248	248	606	358		76	
2.	6-14	219	-139	0			160	
3.	6-21	214	75	406	331			
4.	6-28	274	-57	0			439	
5.	7-5	390	333	0		333	738	
6.	7-12	390	723	1,093	370		397	
7.	7-19	391	21	0		21		
8.	7-26	346	367	0		367	177	21#
9.	8-2	469	815	981	166			
10.	8-9	469	812	812	0	0	917	
11.	8-16	549	746	746	0	0	157	
12.	8-23	313	129	0	0	129	190	
13.	8-30	199	328	328	0	0	210	
14.	9-6	119	20	0		20	671	
15.	9-13	240	158	158	0	0	336	
16.	9-20	240	50	0		50		

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Orange Mutual Citrus Association—(Continued)		Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits# Pkd. Bxs.	Amount of Violation Pkd. Bxs.
Reg. #									
17.		9-27	292	211	566	355		493	
18.		10-4	244	-111	0			344	
19.		10-11	281	406	406	0	0	474	
20.		10-18	281	281			281	1,175	
21.		10-25	311	549	549				
22.		11-1	311	311			311	620	
Totals		6,790		6,276	6,651	1,580	1,512	7,574	21#
Summary:									
Interstate				6,651	39.08%				
Intrastate				1,559	9.16%				
Exports									
By-Products				7,574	44.50%				
Eliminated				1,236	7.26%				
Totals				17,020	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: La Verne Co-Operative Citrus Association

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-07-41	3,557	3,557	6,846	3,289		1,221	2,883
2.	6-14	3,147	2,741	7,044	4,303		1,119	4,303
3.	6-21	2,282	2,289	2,695	406		1,639	
4.	6-28	2,904	2,498	2,482		16		
5.	7-05	2,683	2,692	2,947	255		886	
6.	7-12	2,683	2,428	2,233		195	2,833	
7.	7-19	2,391	2,586	2,973	387		2,238	
8.	7-26	2,115	1,728	1,724		4	2,116	
9.	8-02	2,927	5,367	5,260		107	2,055	
10.	8-09	2,927	2,436	2,664	228		443	
11.	8-16	3,180	2,952	2,140		812	726	
12.	8-23	1,817	1,411	1,411	0	0	1,322	
13.	8-30	1,232	1,318	1,318	0	0	1,690	
14.	9-06	739	653	1,053	400		2,164	
15.	9-13	1,467	1,067	918		149	4,234	
16.	9-20	1,467	1,616	1,724	108		1,626	

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
17.	9-27	1,933	1,643	1,643	0	0	1,709	
18.	10-04	1,611	1,525	1,928	403		2,924	
19.	10-11	1,741	1,105	1,004		101	1,235	
20.	10-18	1,741	1,661	1,995	334		2,300	
21.	10-25	2,184	1,850	1,799		51	513	
22.	11-01	2,184	2,641	2,660	19		345	
Totals	.....	48,912	47,764	56,461	10,132	1,435	107*	7,186
Summary:	Interstate		56,461	56.93%				
	Intrastate		1,738	1.75%				
	Exports		10	—				
	By-Products		35,338	35.64%				
	Eliminated		5,626	5.68%				
Total	.....		99,173	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Libbey Fruit Packing Company

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
21.	10-25	83	3	15	12			
22.	11-01	83	11	9		2		
Totals	.....	166	14	24	12	2		
Summary:	Interstate		24	42.86%				
	Intrastate		32	57.14%				
	By-Products							
	Exports							
	Eliminated							
Total	.....		56	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Chula Vista Lemon Association

Reg #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-07-41	2,673	2,673	7,086	4,413		0	4,007
2.	6-14	2,365	1,959	5,066	3,107		1,545	3,107
3.	6-21	2,206	2,206	5,854	3,648		1,723	3,242
4.	6-28	2,808	2,402	5,126	2,724		1,230	2,724
5.	7-05	2,555	2,555	5,129	2,574		974	2,168
6.	7-12	2,555	2,436	2,371		65	1,821	
7.	7-19	2,568	2,281	2,593	312		1,437	
8.	7-26	2,271	1,959	1,787		172	3,405	
9.	8-02	3,365	3,537	3,726	189		3,118	
10.	8-09	3,365	3,176	3,078		98	2,378	
11.	8-16	3,911	4,009	4,408	399		1,673	
12.	8-23	2,235	1,836	1,834		2	877	
13.	8-30	1,638	1,640	1,990	350		1,799	
14.	9-06	983	812	812	0	0	2,855	
15.	9-13	1,845	2,030	2,030	0	0	1,351	
16.	9-20	1,845	1,624	2,030	406		4,546	

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Reg. #	Week Ending Date	Certificate of Allotment Pkd. Boxes	Certificate of Adj. Allotment Pkd. Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
17.	9-27	2,102	1,675	1,460		215	2,387	
18.	10-04	1,752	1,845	2,250	405		3,515	
19.	10-11	1,702	1,493	1,493	0	0	639	
20.	10-18	1,702	1,554	1,773	219		3,946	
21.	10-25	1,856	2,330	2,330			2,223	
22.	11-01	1,856	1,856	2,262	406		2,381	
Totals		50,158	47,888	66,488	19,152	552	65* 45,823	15,248
Summary:								
Interstate			66,488	57.74%				
Intrastate			2,845	2.47%				
Exports			—	—				
By-Products			45,823	39.79%				
Eliminated			—	—				
Total			115,160	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Handler: Orange County Citrus Growers, Inc.

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
1.	6-07-41							
2.	6-14							
3.	6-21							
4.	6-28							
5.	7-05	6	6	0		6		
6.	7-12	6	12	0		12	6*	
7.	7-19	5	11	0		11	6*	
8.	7-26	5	10	0		10	5*	31
9.	8-02	3	5	0		5	5*	
10.	8-09	3	0	0				
11.	8-16							
12.	8-23		3			3	3*	
13.	8-30							
14.	9-06							
15.	9-13		3			3		
16.	9-20		3			3	3*	

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
17.	9-27							
18.	10-04							
19.	10-11							
20.	10-18							
21.	10-25							
Totals	.....	28	53	0		53	28*	31
Summary:								
	Interstate							
	Intrastate		71	69.61%				
	Exports							
	By-Products		31	30.39%				
	Eliminated							
Total	.....		102	100.00%				

Defendants' Exhibit D—(Continued)

Copy of Shippers' Performance Record—(Continued)

Reg. #	Week Ending Date	Certificate of Allotment Packed Boxes	Certificate of Adj. Allotment Packed Boxes	Total Packed Boxes	Over Shipped Pkd. Bxs.	Under Shipped Pkd. Bxs.	By-Products Forfeits* Pkd. Bxs.	Amount of Violation Pkd. Bxs.
17.	9-27-41	612	813	812		1	1*	682
18.	10-04-41	509	509	406		103		343
19.	10-11-41	466	569	812	243			458
20.	10-18-41	466	223			223		
21.	10-25-41	482	812	812				513
22.	11-01-41	482	375			375		
Totals	.....	19,480	21,033	19,028	2,002	4,007	77*	14,102
Summary:	Interstate		19,028	56.42%				
	Intrastate		597	1.77%				
	Exports		—					
	By-Products		14,102	41.81%				
	Eliminated		—					
Total	.....		33,727	100.00%				

DEFENDANT'S EXHIBIT "E" FOR IDENTIFICATION

COMPARATIVE LEMON SHIPMENTS

Season	MOD Shipments		(From Fruit World) Total Calif	Percentage Shipped by MOD
	Packed Boxes	Cars	Cars	
1929-30	160,500	461.2	13,228	3.5%
1930-31	290,464½	834.7	15,922	5.2
1931-32	308,606	886.8	13,602	6.5
1932-33	271,376	779.8	13,974	5.6
1933-34	270,983	778.7	16,177	4.8
1934-35	387,014	1112.1	18,240	6.1
1935-36	328,764	944.7	17,775	5.3
1936-37	204,299	503.2	14,096	3.6
1937-38	392,219	966.0	16,103	6.0
1938-39	463,186½	1140.9	17,471	6.5
1939-40	510,722½	1257.9	16,781	7.5
1940-41	659,292½	1623.9	20,001	8.1

Note: Car basis 348 boxes previous to 1936-37 season.

Car basis 406 boxes for 1936-37 season and thereafter.

MUTUAL ORANGE DISTRIBUTORS

By
Sales Manager

DEFENDANT'S EXHIBIT "F" FOR IDENTIFICATION

PACKED LEMON SHIPMENTS

Month	Season 1939-40			Season 1940-41		
	MOD Carlot	Total Calif. (Fruit World)	Pct. Shipped	MOD Carlot	Total Calif. (Fruit World)	Pct. Shipped
November:	25	814	3.1	48	995	4.8
December:	40	880	4.5	45	838	5.4
January:	45½	968	4.8	128	1448	8.8
February:	91	1221	7.5	107	910	11.6
March:	100½	1027	9.8	160	1204	13.5
April:	152	1499	10.3	254	1701	14.9
May:	187	2212	8.5	298	2762	10.8
June:	225	2601	8.6	204	2966	6.9
July:	171	2178	7.9	122	2813	4.3
August:	92	1774	5.2	110	2251	4.9
September:	54	709	7.6	66	984	6.7
October:	73	955	7.7	82	1129	7.2
Totals:	1258	16,838*	7.7	1624	20,001	8.1

Note: Discrepancy between Fruit World total of 16,781 and total by month as above.

DEFENDANTS' EXHIBIT "G" FOR IDENTIFICATION

OPERATION OF LEMON PRORATE AS IT AFFECTED M. O. D.

June 1 to August 31, 1941

Allotments and Shipments

(June 1 to August 30, inclusive)

Certificates of Adjusted Allotments.....	345.1
Actual Shipments	448.9
Violation (all within first five weeks of operation of prorate)	89.2
Forfeitures	2.0
Diverted to by-products	31%

Operation of Lemon Prorate as It Affected M. O. D.—(Continued)

Number of Markets in Which Lemons Sold:

June 1 to August 30, inclusive.....114 markets

The most sold in any one market in one week.... 5 cars

Orders Unable Fill:

Actual orders placed with packing houses which they were unable to fill—June 1 to August 30, 1941.

A. Standing orders	84 cars
B. Individual orders	17 cars
C. Standing orders received from regular customers which were not placed with any particular packing house but offered to various houses from time to time and not accepted due to inability to ship.....	68 cars
D. Individual orders received from regular customers which were not placed with packing house due to inability to ship.....	88 cars
	257 cars

Note: While a few cars were rolled some weeks without orders, this was due to the fact that after filling orders, certain sizes and grades remained which did not fit any orders received. Some of these cars were sold at auction.

The actual percentage of our total lemon sales at auction June 1 to August 30 was.....	4%
Total industry lemon shipments (June 1—August 30, inclusive) were 8032 cars; total lemons sold auction that period 4013 cars—percentage sold at auction for industry	50%

EXPLANATION OF ITEM D ON EXHIBIT "G"

Lemon Orders Received But Not Placed With Packing Houses Account No Prorate Available

Place	June	July	August	Total
Albany, N. Y.		1		1
Altoona, Pa.	1			1
Atlanta, Ga. (Nall).....	2	6		8
Austin, Tex.		1		1

Explanation of Item D on Exhibit "G"—
(Continued)

Place	June	July	August	Total
Birmingham, Ala. (Aeco)....	1	2		3
Brunton (Gold Banner, Redlands)		1		1
Buffalo, N. Y.....	1			1
Charlotte, N. C.....		1		1
Cleveland, Ohio	1		1	2
Clovis, N. M.....	1			1
Columbia, S. C.....	3	2	2	7
Dallas, Tex.	2	2		4
Denver, Colo.	1	1		2
El Paso, Tex.		1		1
Houston, Tex.	1	1		2
Indianapolis, Ind.	5	2	2	9
Kansas City, Mo. (Aeco)....		1	1	2
Kansas City, Mo. (MOD)....	2	1		3
Jacksonville, Fla.	1			1
Milwaukee, Wis.	2			2
Minneapolis, Minn.		1		1
Mobile, Ala. (Hoyle).....		1		1
Mobile, Ala. (Aeco).....				0
Nashville, Tenn. (Smith)....	3	2		5
New Orleans, La. (Lally)....	3	4		7
Oklahoma City, Okla.....	1	2		3
Portland, Ore.		1		1
Safeway, Los Angeles		2		2
Salisbury, N. C.....	1			1
Salt Lake City, Utah.....			1	1
San Antonio, Tex.....		5		5
Seattle, Wn.		1		1
Sioux City, Ia.....		1		1
St. Louis, Mo.....	1			1
Toronto, Ont.	1			1
Tulsa, Okla.	1	1		2
Wesco Foods		2		2
Washington, D. C.....		1		1
	35	46	7	88

DEFENDANT'S EXHIBIT "H" FOR IDENTIFICATION

FIELD BOX AVERAGE F. O. B. PACKING HOUSE (Average to the Grower)

	1940	1941
Pool 1—Dec., Jan. and Feb...	\$.79967	\$.50952
Pool 2—Mar., Apr. and May..	1.084	.63562

STORAGE PERIODS

September 1939	27.89 cars
“ 1940	32.89 “
“ 1941	77.89 “

DEFENDANTS' EXHIBIT "I" FOR IDENTIFICATION

PERCENTAGE OF BY-PRODUCTS FRUIT 1941 Pool 2 and 1941 Pool 3

Pool 2 March, April and May			Pool 3 June, July and August		
1940-41 Pool 3			1940-41 Pool 2		
	Boxes	Percentage of Field Boxes		Boxes	Percentage of Field Boxes
Washer Letts	475	.44%		382	.18%
Washer Culls	6,471	5.98		6,031	2.86
Washer Standards	1,524	1.41		4,505	2.14
Grader Letts	87	.08		100	.05
Grader Culls	2,657	2.45		5,314	2.52
Grader Standards	12,123	11.21		14,359	6.81
Black Buttons	3,009	2.78		923	1.42
Contacts	2,662	2.46		1,277	.60
Total	29,008	26.81%		32,891	16.58%
Total Field Boxes	108,199			210,952	

DEFENDANTS' EXHIBIT "J" FOR IDENTIFICATION

GLENDDORA COOPERATIVE CITRUS ASSOCIATION

Packed Box Shipments—Prepared from Pool Shipping Records

	Whole Year		Before pro-rate		After pro-rate	
	Nov. 1st 1940		Nov. 1st 1940		June 1st 1941	
	to		to		to	
	Nov. 1st, 1941		May 31st 1941		Nov. 1st, 1941	
	Boxes	Percent	Boxes	Percent	Boxes	Percent
Interstate	22,802	61.5	16,412	63.2	6,390	57.6
Intrastate	2,918	7.8	1,544	5.95	1,374	12.4
By-Products	10,153	27.1	7,300	28.1	2,853	25.72
Eliminated	1,167	3.1	694	2.67	473	4.27
Total	37,040	99.5	25,950	99.92	11,090	99.99
Total field boxes received, converted to packed boxes season Nov. 1, 1940 to Oct. 31st, 1941.....	54,069.....37,092					
Total packed boxes disposed of in fresh form and to by-products.....	35,873					
Shrinkage and decay.....	1,219					

DEFENDANTS' EXHIBIT "K" FOR IDENTIFICATION

WHITTIER MUTUAL ORANGE & LEMON ASSN.

Packed Box Shipments Prepared from Pool Shipping Records

	Whole Year		Before pro-rate		After pro-rate	
	Nov. 1st 1940		Nov. 1st 1940		June 1st 1941	
	to		to		to	
	Nov. 1st, 1941		May 31st 1941		Nov. 1st, 1941	
	Boxes	Percent	Boxes	Percent	Boxes	Percent
Interstate	28,868	62.4	20,532	65.8	8,336	55.2
Intrastate	4,091	8.8	3,532	11.3	559	3.7
By-Products	11,092	23.9	6,243	20.0	4,850	32.1
Eliminated	2,236	4.9	881	2.9	1,355	9.0
Total	46,287	100%	31,187	100%	15,100	100%
Total field boxes received, converted to packed boxes season Nov. 1st 1940 to Oct. 31st 1941.....	44,198					
Total packed boxes disposed of in fresh fruit form and to By-Products	44,051					
Shrinkage and Decay.....	4,472					

[Title of District Court and Said Consolidated Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS, AND EACH OF THEM, INTEND TO RELY ON THE APPEAL

Come now the defendants LaVerne Cooperative Citrus Association, a corporation, Glendora Cooperative Citrus Association, a corporation, Ventura County Orange and Lemon Association, a corporation, Whittier Mutual Orange and Lemon Association, a corporation, Index Mutual Association, a corporation, and Chula Vista Mutual Lemon Association, a corporation organized and existing under the laws of California, in the above consolidated cases, and as Appellants therein, and pursuant to the provisions of Rule 76 of the Rules of Civil Procedure, state that the points on which they intend to rely on their appeals to the United States Circuit Court of Appeals are as follows:

1. The Order of the Secretary of Agriculture, known and designated as Order No. 53 "Order Regulating The Handling of Lemons In The States of California And Arizona", is, on its face, violative [210] of the Fifth Amendment of the Constitution of the United States, in this, that it deprives these appealing defendants herein, and each of them, of their property without due process of law.

2. Said Order No. 53 is, in its practical application and administration, violative of the Fifth Amendment of the Constitution of the United

States, in this, that it deprives these appealing defendants herein, and each of them, of their property without due process of law.

3. Said Order No. 53, both on its face and in its practical application and administration, is unjust, and discriminatory against these appealing defendants, and each of them, and is confiscatory of the property and business of them, and each of them.

4. The Trial Court erred in

(a) Holding that said Order No. 53 and the actions and conduct of the Secretary of Agriculture, and his agents, (in particular the Lemon Administrative Committee) in the application and administration of said Order were, in these injunction proceedings, conclusively presumed to be constitutional and valid, and that these appealing defendants, and each of them, had no right to question the constitutionality or validity of said Order or said actions or conduct.

(b) In precluding and preventing these appealing defendants, and each of them, from introducing evidence to prove or establish the facts alleged in their respective answers, and especially in the separate defenses therein set forth.

(c) In precluding and preventing these appealing defendants, and each of them, from introducing the testimony and evidence specifically detailed in the several offers of proof made by these appealing defendants at the trial.

(d) In denying the motion of these appealing

defendants, and each of them, for a discovery and inspection of certain documents and papers in the possession and control of the Secretary of [211] Agriculture under Rule 34 of the Rules of Civil Procedure.

5. The evidence received by the Trial Court, the Findings of Fact made by the Trial Court, and the law applicable to said evidence and Findings are insufficient to and do not support the following designated Conclusions of Law of said Trial Court.

(a) Conclusion No. V., to the effect that said Order No. 53 is applicable to all handlers of lemons grown in California and Arizona shipped in interstate commerce after April 10, 1941.

(b) Conclusion No. VI., to the effect that, in so far as this particular form of action is concerned, it is conclusively presumed that the establishment of the Lemon Administrative Committee is in accordance with law, and valid, and that said Committee has, at all times, legally exercised only the powers and performed the duties given and required by law.

(c) Conclusion No. VII., to the effect that the pro rate bases issued to each of the defendants herein are, in so far as this particular form of action is concerned, conclusively presumed to have been regularly made and are valid.

(d) Conclusion No. VIII., to the effect that the allotments issued to each of these appealing defendants, in so far as this particular form of action is concerned, are conclusively presumed to have been regularly made and are valid.

(e) Conclusion No. IX., to the effect that the shipments by each of these appealing defendants for interstate commerce, in excess of their respective allotments, were in violation of law.

(f) Conclusion No. X., to the effect that the United States of America is entitled to a permanent injunction restraining these appealing defendants, and each of them, and their officers and agents from handling lemons in violation of the terms and pro- [212] visions of said Order No. 53, and to a judgment for costs in this proceeding.

6. The evidence is insufficient to sustain Finding of Fact No. XIII., in this that there was no evidence to prove that the non-compliance by defendants with Order No. 53

(a) Was or would be injurious to interstate or foreign commerce; or

(b) Was or would be injurious to growers, handlers or consumers of lemons; or

(c) Did or would threaten the stability of interstate or foreign commerce in lemons; or

(d) Did or would tend to thwart the National policy of improving the marketing conditions in the handling of lemons in interstate or foreign commerce.

Dated: Los Angeles, California, this 27 day of July, 1942.

GUY RICHARDS CRUMP

Attorney for said defendants
and appellants [213]

LaVERNE CASE

[Title Court and Cause in LaVerne Case.]

NOTICE OF APPEAL TO UNITED STATES
CIRCUIT COURT OF APPEALS

Notice is hereby given that La Verne Co-Operative Citrus Association, a corporation, and Glendora Co-Operative Citrus Association, a corporation, defendants above named, hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit from the final judgment entered in this action on the 29th day of April, 1942.

Dated: Los Angeles, California, July 27, 1942.

GUY RICHARDS CRUMP

Attorney for Appellants La
Verne Co-Operative Citrus
Association, a corporation,
and Glendora Cooperative
Citrus Association, a corpo-
ration.

Address:

458 South Spring Street,
Los Angeles, California.

Telephone:

Trinity 4152

[Endorsed]: Filed July 27, 1942. [214]

VENTURA CASE

[Title Court and Cause in Ventura Case.]

NOTICE OF APPEAL TO UNITED STATES
CIRCUIT COURT OF APPEALS

Notice is hereby given that Ventura Orange and Lemon Association, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit from the final judgment entered in this action on the 29th day of April, 1942.

Dated: Los Angeles, California, July 27, 1942.

GUY RICHARDS CRUMP

Attorney for Appellant Ven-
tura Orange and Lemon As-
sociation, a corporation

Address:

458 South Spring Street
Los Angeles, California.

Telephone:

Trinity 4152

[Endorsed]: Filed July 27, 1942. [215]

WHITTIER CASE.

[Title Court and Cause in Whittier Case.]

NOTICE OF APPEAL TO UNITED STATES
CIRCUIT COURT OF APPEALS

Notice is hereby given that Whittier Mutual Orange & Lemon Association, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit from the final judgment entered in this action on the 29th day of April, 1942.

Dated: Los Angeles, California, July 27, 1942.

GUY RICHARDS CRUMP

Attorney for Appellant Whittier Mutual Orange & Lemon Association, a corporation.

Address:

458 South Spring Street,
Los Angeles, California.

Telephone:

Trinity 4152

[Endorsed]: Filed July 27, 1942. [216]

INDEX CASE

[Title Court and Cause in Index Case.]

NOTICE OF APPEAL TO UNITED STATES
CIRCUIT COURT OF APPEALS

Notice is hereby given that Index Mutual Association, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit from the final judgment entered in this action on the 29th day of April, 1942.

Dated: Los Angeles, California, July 27, 1942.

GUY RICHARDS CRUMP

Attorney for Appellant Index
Mutual Association, a corporation.

Address:

458 South Spring Street,
Los Angeles, California.

Telephone:

Trinity 4152

[Endorsed]: Filed July 27, 1942. [217]

CHULA VISTA CASE.

[Title Court and Cause in Chula Vista Case.]

NOTICE OF APPEAL TO UNITED STATES
CIRCUIT COURT OF APPEALS

Notice is hereby given that Chula Vista Mutual Lemon Association, a corporation organized and existing under the laws of California, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit from the final judgment entered in this action on the 29th day of April, 1942.

Dated: Los Angeles, California, July 27, 1942.

GUY RICHARDS CRUMP

Attorney for Appellant Chula
Vista Mutual Lemon Asso-
tion, a corporation.

Address:

458 South Spring Street,
Los Angeles, California.

Telephone:

Trinity 4152

[Endorsed]: Filed July 27, 1942. [218]

STIPULATION AS TO AGREED STATE-
MENT OF THE CASE FOR USE ON AP-
PEAL

The foregoing statement is hereby agreed to and approved as a full and correct "Statement of the Case" to be used on appeal to the United States Circuit Court of Appeals for the 9th Circuit, under the provisions of Rule 76 of the Rules of Civil Procedure.

It is further stipulated and agreed that said statement contains, among other things, all of the evidence (including all stipulations of facts admitted) received by the Court upon which the Findings of Fact, Conclusions of Law and Judgment in the La Verne, Ventura, Whittier, Index and Chula Vista Cases were based. The statement in the Findings of Fact and Conclusions of Law and the Final Judgment to the effect that the hearing and trial of said cause was had upon, among other things, "affidavits filed in support of and in opposition to the application for preliminary injunction" applies to certain of the other five cases consolidated for trial and tried with the five cases covered by this agreed statement of the case, in which said other five cases such affidavits were, in fact, filed. No such affidavits were filed or used in any of the five cases in connection with which this agreed statement is prepared. Said statement as to said affidavits was inserted in said Findings and Judgment by inadvertence.

It is further stipulated and agreed that said agreed statement shall constitute and be used as the record on appeal in each of said five named cases, and that, subject to the approval of said Appellate Court, said five cases may be consolidated on said appeal, and be heard and decided by said Appellate Court on [219] the one record on appeal.

Dated: This 18 day of August, 1942.

WM. FLEET PALMER,

United States Attorney,

WM. W. WORTHINGTON,

Assistant U. S. Attorney.

By WM. W. WORTHINGTON,

Attorneys for Plaintiff and
Appellee.

GUY RICHARDS CRUMP

Attorney for Defendants and
Appellants.

The foregoing Statement of the Case is hereby approved.

Dated: This 15 day of Sept., 1942.

BEN HARRISON

U. S. District Judge. [220]

Received: copy of the within Agreed Statement of the Case for Use on Appeal, this 18 day of August, 1942.

WM. FLEET PALMER,

WM. W. WORTHINGTON,

Attorneys for Plaintiff.

Premium charged for this bond is \$10.00 per annum.

Bond No. 42367

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That, Columbia Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York, is held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said United States of America, to which payment, well and truly to be made, the said Columbia Casualty Company binds itself firmly by these presents.

Sealed with the corporate seal and dated the 21st day of July, 1942. [221]

The condition of the above obligation is such that:

Whereas, lately, to-wit: on the 29th day of April, 1942, in the above entitled action in the District Court of the United States, for the Southern District of California, Central Division, a final judgment was rendered and entered against defendants La Verne Co-operative Citrus Association, a corporation, and Glendora Co-operative Citrus Association, a corporation, and in favor of said plaintiff; and

Whereas, the said La Verne Co-operative Citrus

Association, a corporation, and Glendora Co-operative Citrus Association, a corporation, by a Notice of Appeal, to be filed contemporaneously herewith, are appealing from said judgment, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, for a reversal thereof.

Now, Therefore, the condition of the above obligation is such that if the said La Verne Co-operative Citrus Association, a corporation, and Glendora Co-operative Citrus Association, a corporation, shall prosecute said appeal to effect, and shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as said Circuit Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, said Columbia Casualty Company has caused the foregoing instrument to be executed and its corporate seal affixed thereto by its duly authorized Attorney in fact, at Los Angeles, California, this 21st day of July, 1942.

COLUMBIA CASUALTY
COMPANY,

By WILLIAM M. CURRAN, JR.,
Attorney in fact. [222]

State of California,
County of Los Angeles—ss.

On this 21st day of July, 1942, before me Rosemary Goebel, a Notary Public, in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared William M. Curran, Jr., known to me to be the person whose name is subscribed to the above and foregoing instrument, as the Attorney in fact of Columbia Casualty Company, the corporation that executed said instrument, and acknowledged to me that he subscribed the name of Columbia Casualty Company thereto, as Principal, and his own name as Attorney in fact.

I further certify that said instrument was executed by said William M. Curran, Jr., as Attorney in fact of Columbia Casualty Company, in my presence, and that his signature thereto is genuine.

Witness my hand and seal the day and year in this certificate first above written.

[Notarial Seal]

ROSEMARY GOEBEL,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires: June 15, 1944.

[Endorsed]: Filed Jul. 27, 1942. [223]

Premium charged for this bond is \$10.00 per annum.

Bond No. 42366

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That, Columbia Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York, is held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said United States of America, to which payment, well and truly to be made, the said Columbia Casualty Company binds itself firmly by these presents.

Sealed with the corporate seal and dated the 21st day of July, 1942. [224]

The condition of the above obligation is such that:

Whereas, lately, to-wit: on the 29th day of April, 1942, in the above entitled action in the District Court of the United States, for the Southern District of California, Central Division, a final judgment was rendered and entered against defendant, Ventura County Orange and Lemon Association, a corporation, and in favor of said plaintiff; and

Whereas, the said Ventura County Orange and Lemon Association, a corporation, by a Notice of Appeal, to be filed contemporaneously herewith, is

appealing from said judgment, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, for a reversal thereof.

Now, Therefore, the condition of the above obligation is such that if the said Ventura County Orange and Lemon Association, a corporation, shall prosecute said appeal to effect, and shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as said Circuit Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, said Columbia Casualty Company has caused the foregoing instrument to be executed and its corporate seal affixed thereto by its duly authorized Attorney in fact, at Los Angeles, California, this 21st day of July, 1942.

[Seal of Columbia Casualty Company]

COLUMBIA CASUALTY
COMPANY,

By WILLIAM M. CURRAN, JR.,
Attorney in fact. [225]

State of California,
County of Los Angeles—ss.

On this 21st day of July, 1942, before me Rosemary Goebel, a Notary Public, in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, per-

sonally appeared William M. Curran, Jr., known to me to be the person whose name is subscribed to the above and foregoing instrument, as the Attorney in fact of Columbia Casualty Company, the corporation that executed said instrument, and acknowledged to me that he subscribed the name of Columbia Casualty Company thereto, as Principal, and his own name as Attorney in fact.

I further certify that said instrument was executed by said William Curran, Jr., as Attorney in fact of Columbia Casualty Company, in my presence, and that his signature thereto is genuine.

Witness my hand and seal the day and year in this certificate first above written.

[Notarial Seal]

ROSEMARY GOEBEL,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires: June 15, 1944.

[Endorsed]: Filed Jul. 27, 1942. [226]

Premium charged for this bond is \$10.00 per annum.

Bond No. 42365

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That, Columbia Casualty Company, a corporation organized and existing under and by virtue

of the laws of the State of New York, is held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said United States of America, to which payment, well and truly to be made, the said Columbia Casualty Company binds itself firmly by these presents.

Sealed with the corporate seal and dated the 21st day of July, 1942. [227]

The condition of the above obligation is such that:

Whereas, lately, to-wit: on the 29th day of April, 1942, in the above entitled action in the District Court of the United States, for the Southern District of California, Central Division, a final judgment was renedered and entered against defendant, Whittier Mutual Orange & Lemon Association, a corporation, and in favor of said plaintiff; and

Whereas, the said Whittier Mutual Orange & Lemon Association, a corporation, by a Notice of Appeal, to be filed contemporaneously herewith, is appealing from said judgment, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, for a reversal thereof.

Now, Therefore, the condition of the above obligation is such that if the said Whittier Mutual Orange & Lemon Association, a corporation, shall prosecute said appeal to effect, and shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as said Circuit Court may award if the judgment is modified, then this obli-

gation to be void, otherwise to remain in full force and effect.

In Witness Whereof, said Columbia Casualty Company has caused the foregoing instrument to be executed and its corporate seal affixed thereto by its duly authorized Attorney in fact, at Los Angeles, California, this 21st day of July, 1942.

COLUMBIA CASUALTY
COMPANY

By WILLIAM M. CURRAN, JR.,
Attorney in fact. [228]

State of California,
County of Los Angeles—ss.

On this 21st day of July, 1942, before me, Rosemary Goebel, a Notary Public, in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared William M. Curran, Jr., known to me to be the person whose name is subscribed to the above and foregoing instrument, as the Attorney in fact of Columbia Casualty Company, the corporation that executed said instrument, and acknowledged to me that he subscribed the name of Columbia Casualty Company thereto, as Principal, and his own name as Attorney in fact.

I further certify that said instrument was executed by said William M. Curran, Jr., as Attorney in fact of Columbia Casualty Company, in my

presence, and that his signature thereto is genuine.

Witness my hand and seal the day and year in this certificate first above written.

[Notarial Seal]

ROSEMARY GOEBEL,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires: June 15, 1944.

[Endorsed]: Filed Jul. 27, 1942. [229]

Premium charged for this bond is \$10.00 per annum.

Bond No. 42364

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That, Columbia Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York, is held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said United States of America, to which payment, well and truly to be made, the said Columbia Casualty Company binds itself firmly by these presents.

Sealed with the corporate seal and dated the 21st day of July, 1942. [230]

The condition of the above obligation is such that:

Whereas, lately, to-wit: on the 29th day of April, 1942, in the above entitled action in the District Court of the United States, for the Southern District of California, Central Division, a final judgment was rendered and entered against defendant, Index Mutual Association, a corporation, and in favor of said plaintiff; and

Whereas, the said Index Mutual Association, a corporation, by a Notice of Appeal, to be filed contemporaneously herewith, is appealing from said judgment, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, for a reversal thereof.

Now, Therefore, the condition of the above obligation is such that if the said Index Mutual Association, a corporation, shall prosecute said appeal to effect, and shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as said Circuit Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, said Columbia Casualty Company has caused the foregoing instrument to be executed and its corporate seal affixed thereto by its duly authorized Attorney in fact, at Los Angeles, California, this 21st day of July, 1942.

[Corporate Seal]

COLUMBIA CASUALTY
COMPANY,

By WILLIAM M. CURRAN, JR.,
Attorney in fact. [231]

State of California,
County of Los Angeles—ss.

On this 21st day of July, 1942, before me, Rosemary Goebel, a Notary Public, in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared William M. Curran, Jr., known to me to be the person whose name is subscribed to the above and foregoing instrument, as the Attorney in fact of Columbia Casualty Company, the corporation that executed said instrument, and acknowledged to me that he subscribed the name of Columbia Casualty Company there, as Principal, and his own name as Attorney in fact.

I further certify that said instrument was executed by said William M. Curran, Jr., as Attorney in fact of Columbia Casualty Company, in my presence, and that his signature thereto is genuine.

Witness my hand and seal the day and year in this certificate first above written.

[Notarial Seal]

ROSEMARY GOEBEL,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires: June 15, 1944.

[Endorsed]: Filed Jul. 27, 1942. [232]

Premium charged for this bond is \$10.00 per annum.

Bond No. 42363

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That, Columbia Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York, is held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said United States of America, to which payment, well and truly to be made, the said Columbia Casualty Company binds itself firmly by these presents.

Sealed with the corporate seal and dated the 21st day of July, 1942. [233]

The condition of the above obligation is such that: Whereas, lately, to-wit: on the 29th day of April, 1942, in the above entitled action in the District Court of the United States, for the Southern District of California, Southern Division, a final judgment was rendered and entered against defendant, Chula Vista Mutual Lemon Association, a corporation, and in favor of said plaintiff; and

Whereas, the said Chula Vista Mutual Lemon Association, a corporation, by a Notice of Appeal, to be filed contemporaneously herewith, is appealing

from said judgment, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, for a reversal thereof.

Now, Therefore, the condition of the above obligation is such that if the said Chula Vista Mutual Lemon Association, a corporation, shall prosecute said appeal to effect, and shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as said Circuit Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, said Columbia Casualty Company has caused the foregoing instrument to be executed and its corporate seal affixed thereto by its duly authorized Attorney in fact, at Los Angeles, California, this 21st day of July, 1942.

[Corporate Seal]

COLUMBIA CASUALTY
COMPANY,

By WILLIAM M. CURRAN, JR.,
Attorney in fact. [234]

State of California,
County of Los Angeles—ss.

On this 21st day of July, 1942, before me, Rosemary Goebel, a Notary Public, in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared William M. Curran, Jr., known

to me to be the person whose name is subscribed to the above and foregoing instrument, as the Attorney in fact of Columbia Casualty Company, the corporation that executed said instrument, and acknowledged to me that he subscribed the name of Columbia Casualty Company thereto, as Principal, and his own name as Attorney in fact.

I further certify that said instrument was executed by said William M. Curran, Jr., as Attorney in fact of Columbia Casualty Company in my presence, and that his signature thereto is genuine.

Witness my hand and seal the day and year in this certificate first above written.

[Notarial Seal]

ROSEMARY GOEBEL,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 15, 1944.

[Endorsed]: Filed Jul. 27, 1942. [235]

[Title of District Court and Said Consolidated Causes.]

STIPULATION AND ORDER EXTENDING
TIME TO FILE RECORD ON APPEAL
AND DOCKET CAUSES IN APPELLATE
COURT

Whereas, the defendants La Verne Co-operative Citrus Association, a corporation, and Glendora Co-operative Citrus Association, a corporation, in the above entitled case No. 1596-BH Civil, and the defendants in each of the other four above entitled cases did, on the 27th day of July, 1942, file with the Clerk of the above entitled Court their separate Notices of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the respective final judgments entered against them in the above entitled causes, and did, on said 27th day of July, 1942, present to and serve upon the United States Attorney, as Attorney for the Plaintiff in said causes, at Los Angeles, California, a proposed Agreed Statement of the Case for Use on Appeal, Under Rule 76 of the Rules of Civil Procedure; and [237]

Whereas, the respective attorneys for the Appellants and Appellee are now engaged in examining and considering said Agreed Statement for the purpose of agreeing upon and settling the same as the record on appeal in said causes.

Now, Therefore, It Is Hereby Stipulated and Agreed that the time within which the record on

said appeals may be filed and said causes on appeal docketed in and with the Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including the first day of October, 1942.

Dated: Los Angeles, California, this 29th day of July, 1942.

WM. FLEET PALMER,

United States Attorney

WM. W. WORTHINGTON,

Assistant U. S. Attorney.

By WM. W. WORTHINGTON,

Attorneys for Plaintiff and
Appellee.

GUY RICHARDS CRUMP,

By A. I. McCORMICK,

Attorney for Defendants and
Appellants.

ORDER

Upon reading and filing the above and foregoing stipulation, and good cause appearing therefor,

It Is Hereby Ordered that the time within which the record on said appeals may be filed and said causes on appeal docketed in and with the Circuit Court of Appeals for the Ninth Circuit may be and is hereby extended up to and including the first day of October, 1942.

BEN HARRISON,

U. S. District Judge.

[Endorsed]: Filed Jul. 29, 1942. [238]

[Title of District Court and Said Consolidated Causes.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 238 inclusive contain the Original Agreed Statement of the Case for use on Appeal, under Rule 76 of the Rules of Civil Procedure and full, true and correct copies of Bonds for Costs on Appeal and Stipulation and Order Extending time to file record and Docket Causes which constitute the record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$6.35, which amount has been paid to me by the Appellants.

Witness my hand and the seal of the said District Court this 23 day of September, 1942.

[Seal]

EDMUND L. SMITH,

Clerk.

By THEODORE HOCKE,

Deputy Clerk.

[Endorsed]: No. 10266. United States Circuit Court of Appeals for the Ninth Circuit. La Verne Co-operative Citrus Association, a corporation, Glendora Co-operative Citrus Association, a corporation, Ventura Orange and Lemon Association, a corporation, Whittier Mutual Orange & Lemon Association, a corporation, Index Mutual Association, a corporation and Chula Vista Mutual Lemon Association, a corporation, organized and existing under the laws of California, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10266

LaVERNE CO-OPERATIVE CITRUS ASSO-
CIATION, a corporation, and GLENDORA
CO-OPERATIVE CITRUS ASSOCIATION,
a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

VENTURA COUNTY ORANGE AND LEMON
ASSOCIATION, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

WHITTIER MUTUAL ORANGE AND LEMON
ASSOCIATION, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

INDEX MUTUAL ASSOCIATION, a corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

CHULA VISTA MUTUAL LEMON ASSOCIA-
TION, a corporation organized and existing
under the laws of California,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

VERIFIED APPLICATION FOR ORDER FOR
CONSOLIDATION OF APPEALS AND
CONSENT OF APPELLEE THERETO.

United States of America,
State of California,
County of Los Angeles—ss.

Guy Richards Crump, being first duly sworn, on oath deposes and says:

I am the attorney and counsel for the Appellants in each of the above entitled five causes. I was one of the attorneys for said Appellants, and each of them, in the trial court, namely, In the District Court of the United States, for the Southern District of California, Central Division, and represented said Appellants (as defendants in said trial court) during all of the proceedings in said court.

Pursuant to an order of said trial court, all of said five causes were consolidated and tried together therein, and the evidence introduced was applicable to and considered by said court in connection with each and all of said five causes.

In each of said causes the United States of America was plaintiff, and each defendant was a handler of lemons, and the action was brought for the sole purpose of obtaining a permanent injunction enjoining the respective defendants from violating an order of the Secretary of Agriculture concerning the handling and shipping of lemons in interstate commerce. The issues were the same in all of the cases. The facts found and the conclusions arrived at by the trial court as to the issues involved were the same in all of said five causes, and the final decrees for permanent injunction made and entered by the trial court were the same in all of said causes.

The certified record on appeal herein is in the form of an Agreed Statement of the Case under rule 76 of the Rules of Civil Procedure, and relates to and covers all of said five causes. The stipulation concerning said Agreed Statement (with the approval of the trial Judge) provides, among other things, as follows:

“It Is Further Stipulated And Agreed that said agreed statement shall constitute and be used as the record on appeal in each of said five named cases, and that, subject to the approval of said Appellate Court, said five cases may be consolidated on said appeal, and be heard and decided by said Appellate Court on the one record on appeal.”

Wherefore, affiant, for and on behalf of said Appellants, hereby applies for and requests an order of this Court to the effect that said five causes shall be consolidated for hearing on this appeal, and that said appeals in said five causes shall be heard and decided upon the one record which has been filed herein.

GUY RICHARDS CRUMP

Subscribed and sworn to before me, this 23rd day of September, 1942.

[Seal] HERTHA N. EBERT,
Notary Public in and for the County of Los Angeles,
State of California.

It Is So Ordered:

WILLIAM DENMAN,
U. S. Circuit Judge.

Received copy of the above and foregoing affidavit and application, this 23rd day of September, 1942, and the Appellee hereby consents to the making and entry of the order therein requested.

LEO V. SILVERSTEIN,
United States Attorney,
WM. M. WORTHINGTON,
Assistant U. S. Attorney,
By WM. W. WORTHINGTON,
Attorneys for Appellee.

[Title of Circuit Court of Appeals and Causes.]

APPELLANTS' STATEMENT OF POINTS TO
BE RELIED UPON AND DESIGNATION
OF THE RECORD TO BE PRINTED.

Come Now the Appellants, and each of them, in the above entitled five causes, and hereby adopt the Statement Of Points On Which Appellants, And Each Of Them, Intend To Rely On The Appeal, filed with the Clerk of the Trial Court, and set forth in full in the Agreed Statement Of The Case, commencing at Page 210 of the Certified Record on Appeal herein. Appellants intend to rely in this Court of Appeals on the points set forth in said Statement, and on all of said points.

Appellants further state that they believe and consider that the entire record certified by the trial court is necessary for the consideration of the points upon which said Appellants intend to rely

in this court, and they desire to have said entire record printed herein.

GUY RICHARDS CRUMP,
Attorney for the respective
Appellants in said five
causes.

Received copy of the above and foregoing Statement and Designation, this 23rd day of September, 1942.

LEO V. SILVERSTEIN,
United States Attorney,
WM. M. WORTHINGTON,
Assistant United States
Attorney,
By WM. W. WORTHINGTON,
Attorneys for Appellee.

[Title of Circuit Court of Appeals and Causes.]

STIPULATION IN RE: PRINTING
OF RECORD ON APPEAL

It Is Hereby Stipulated And Agreed by and between all of the parties to the above entitled five causes on appeal, through and by their respective attorneys, that the official Government documents in printed pamphlet form, attached to the complaints in each of said causes, and designated as Exhibit "A" and Exhibit "B" (one of each of said printed pamphlets being a part of the Agreed Statement of the Case, certified by the Clerk of

the trial court herein), may be included in the printed record herein by physically incorporating in said printed record the printed copies of said two pamphlets instead of by printing their contents in such printed record, and

It Is Further Stipulated And Agreed that said two pamphlets and documents (the number thereof being limited and extremely difficult to obtain) need be included in only four copies of the printed record.

It Is Further Stipulated that an order of Court may be made and entered in conformity herewith.

Dated: September 23, 1942.

GUY RICHARDS CRUMP,
Attorney for the respective
Appellants in said five
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It Is So Ordered:

WILLIAM DENMAN,
U. S. Circuit Judge.

No. 10266

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LA VERNE CO-OPERATIVE CITRUS ASSOCIATION, a corporation,
GILBERTA CO-OPERATIVE CITRUS ASSOCIATION, a corporation,
VENTURA CHERRY AND LEMON ASSOCIATION, a corporation,
WHITTIER MUTUAL ORANGE & LEMON ASSOCIATION, a corporation,
JERRY MUTUAL ASSOCIATION, a corporation, and
CITRUS VISTA MUTUAL LEMON ASSOCIATION, a corporation,
organized and existing under the laws of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

FILED

APR 13 1943

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

Introductory Statement.

Pursuant to the order of this Court [R. 325] the five causes involved in these appeals have been consolidated for hearing and decision herein on one record. They were consolidated and tried together in the lower court. They all involve substantially the same questions of fact and points of law. Hence, this one brief is written and presented to cover all of the five appeals.

The pleadings, findings and conclusions of law and the final judgments are substantially the same in form and substance. The record, which is based primarily upon an "Agreed Statement of the Case," under Rule 76 of the Rules of Civil Procedure, sets out in full the pleadings, orders, findings of fact, conclusions of law and the final judgment in the case entitled "UNITED STATES OF AMERICA, Plaintiff, vs. LA VERNE CO-OPERATIVE CITRUS ASSOCIATION, a corporation *et al.*, Defendants," in the District Court [R. 6 to 82]. This case will hereinafter be referred to and called "The La Verne Case." The corresponding pleadings, orders and other papers in the remaining four cases are set forth by reference to the files in the La Verne Case, except in the particulars in which they differ therefrom, in which case the difference is noted.

At the trial, on the suggestion of the Court [R. 131], the file in the La Verne Case was referred to and used as a typical example of all the cases on trial, and the same policy will be pursued in this brief, thus avoiding unnecessary repetition.

Each case is concerned with and has as its controlling legislation the Act of Congress of May 12, 1933 (48 Stat. 31—U. S. C. A., Title 7, Section 601 *et seq.*), known as the Agricultural Adjustment Act, as amended August 24, 1934 (49 Stat. 672), and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public No. 137, 75th Congress) [R. 8]. Said Agricultural Adjustment Act, as so re-enacted and amended, will be hereinafter referred to and designated as "The Act."

While no question is raised as to the validity or constitutionality of the Act itself, yet the construction and effect of the Act as to the extent and limitations of the jurisdic-

ion and powers of the Secretary of Agriculture and his subordinates thereunder are directly involved in these appeals and, in particular, the validity and constitutionality of that certain Order of the Secretary of Agriculture known and designated as Order No. 53, "Order Regulating the Handling of Lemons Grown in the States of Arizona and California," effective April 10, 1941, issued by said Secretary under the Act, both on its face and in the application and administration thereof, are directly challenged by the several appellants herein, and are involved in these appeals. The printed Government pamphlet containing Order No. 53 is physically attached to and incorporated in the record herein, pursuant to the order of this Court [R. 327].

Statement of the Pleadings and Facts Disclosing the Basis of Jurisdiction.

Jurisdiction of the District Court.

Each of the five actions involved in these consolidated appeals was instituted by the United States of America, as plaintiff, against the respective defendant or defendants therein, each of whom was a handler and shipper of lemons in interstate commerce from and out of the Southern District of California. The purpose of each of said actions was to obtain a permanent injunction restraining defendants from handling lemons in violation of the terms of Order No. 53 [Comp. Par. V, R. 8, and prayer thereof R. 21].

Each of the appealing defendants answered, denying certain material allegations of the complaint and setting up a separate and special defense. After a trial, the Court made and entered its final judgments, denominated "Decree for Permanent Injunction," in which the respective de-

endants were restrained and enjoined from handling or shipping lemons in violation of the terms of the Order [R. 80-92-95-98-101].

The plaintiff, United States of America, invoked the jurisdiction of the District Court under and by virtue of the provisions of Section 8a (6) of the Act. The statute referred to expressly vests in the District Courts of the United States jurisdiction to enforce and to prevent and restrain any person from violating any order of the Secretary of Agriculture issued pursuant to the provisions of the Act.

Jurisdiction of This Court.

The jurisdiction of this Court is disclosed by the pleadings and the final judgments rendered by said District Court [R. 80-92-95-98-101], and the several Notices of Appeal from said final judgments [R. 298-299-300-301-302]. Jurisdiction is invoked under Section 128 of the Judicial Code, as amended (U. S. C. A., Title 28, Section 225 (a) First).

Statement of the Case.

A. SUMMARY OF THE PLEADINGS.

Allegations I to VI, both inclusive, of the Complaint aver the corporate capacity of the defendants, and other matters of inducement and are admitted by the Answer.

The Complaint avers that, pursuant to the provisions of the Act, the Secretary of Agriculture made and issued Order No. 53 (hereinafter referred to as "the Order") after a public hearing, of which due and legal notice had been given, and at which all interested persons, including defendants, were afforded an opportunity to be heard; that the Secretary found, from evidence introduced at said

hearing, that the issuance of the Order would tend to improve marketing conditions in lemons and to effectuate the policy of the Act; that the Order was issued April 5, 1941, and became effective April 10, 1941 [Pars. VII and VIII, R. 9-10]; that the Order regulates the handling of lemons in the same manner as a Marketing Agreement executed by the Secretary April 5, 1941, after a public hearing, which Agreement was signed by handlers who handled more than 80% of the lemons covered by the Order; that the Secretary determined that the Order was approved by producers who, during a representative period (established by the Secretary), produced at least two-thirds of the lemons produced for market during such period in California and Arizona [Par. IX, R. 10]; that, subsequent to the effective date of the Order, and pursuant to Section 953.2 of the same, the Secretary established a Lemon Administrative Committee which at all times thereafter functioned as provided in the Order [Par. X, R. 11]; that each of the defendants is a handler of lemons, as defined in the Order, and prior to May 31, 1941, filed with the Committee an application for a prorated base and for allotments [Par. XI, R. 12]; that the Secretary on or about May 31, 1942, pursuant to Section 953.4 of the Order, on recommendation of the Committee and other information, fixed and determined proration bases for all handlers of lemons who applied for a prorated base, including defendants, and established a weekly regulation period for handling and shipping lemons commencing June 1 and ending June 8, 1941 [Par. XII, R. 12]; that the Secretary, under the Order, fixed the total quantity of lemons which could be shipped from California and Arizona in interstate and foreign commerce during said period at 650 carloads [Par. XIII, R. 12]; and fixed a certain allotment for each of the

defendants for said period at a certain definite number of packed boxes of lemons, which was the largest amount which said respective defendants could lawfully ship in such commerce during said period [Pars. XIV and XVII, R. 13-14]; that each of the defendants during said period handled and shipped in such commerce a quantity of lemons in excess of the amount authorized to be shipped by such respective defendants in violation of the Act and Order [Pars. XV and XVI, R. 13-14; XVIII and XIX, R. 15].

That portion of the Answer directed to paragraphs VII to XIX, both inclusive, of the Complaint, makes certain admissions and certain denials of said allegations. The issues raised by said denials need not be considered on these appeals by reason of the fact that the Stipulations of Fact entered into, both in writing and orally at the trial, are sufficient to sustain the Findings of Fact made by the Court (to the extent to which such Findings go) on the issues raised by said denials.

Paragraph XXIII of the Complaint [R. 17] avers active competition in the lemon market, the absence of regulations therein and the adverse effect thereof on interstate and foreign commerce, with consequent lowering of prices to handlers and growers.

The Answer, paragraph XXIII [R. 30-32], admits the allegations of said paragraph XXIII of the Complaint in so far as they describe the adverse conditions of the lemon market, but expressly avers that such conditions have not been caused or aggravated by the absence of regulations of marketing, but have been caused and aggravated by the operation of Order No. 53, which Order and the operation thereof have resulted in unstabilized and disorderly marketing conditions.

The Court made no finding on or concerning the issues raised by the pleadings concerning this paragraph XXIII. It, evidently, considered the same as immaterial and surplusage in view of the theory it took of the entire case [R. 139].

Paragraph XXIV [R. 18-20] avers that each of the defendants conducts its business in competition with other handlers of lemons complying with the Order; that the effect of defendants' violation of the Order has impaired the effectiveness of the program inaugurated by the Order in said commerce in lemons, to disrupt and obstruct such commerce, to render partially ineffective the lawful regulation of such commerce, as provided in the Act and Order, and to bring about unstabilized market conditions which have injured the lemon industry, and which Congress has sought to prevent, and to defeat the policy of Congress as declared in the Act.

It is further alleged that each of the defendants has failed and refused, and is failing and refusing to comply with the Order, and has indicated that it will violate the provisions thereof in the future; and that the continued non-compliance by defendants with the Order is and will be injurious to such commerce in lemons, and to growers, handlers and consumers thereof, and threatens the stability of such commerce; that unless each of defendants is immediately restrained from further violation of the Order, other handlers of lemons subject to it and future Orders of the Secretary will be encouraged to violate the provisions thereof, all of which will tend to thwart the National policy of improving marketing conditions; that violations of the Order by defendants cause, and will continue to cause, great and irreparable damage to the plaintiff and to the public, and plaintiff is without adequate remedy at law.

Concerning paragraph XXIV of the Complaint, the *Answer* admits that defendants conduct their business in competition with other handlers of lemons, and that each of the defendants at times prior to the service of the restraining Order have failed and refused to comply with the terms of the Order fixing the weekly allotments and limiting their shipments in said commerce, and admits that the plan of regulation contained in the Order contemplates the proration and allotment of lemons from week to week under conditions specified in the Order. All of the other allegations in said paragraph are denied [Ans. Par. XXIV, R. 32].

The Court made a Finding [Find. XIII, R. 73] adverse to defendants on certain of the material issues thus raised by said paragraph XXIII and the Answer thereto, which said Finding is challenged by appellants as being unsupported by the evidence [see Specification of Errors No. 9, *infra* p. 22].

B. SPECIAL AFFIRMATIVE DEFENSE.

Each of the Answers contained a special affirmative defense [R. 33], in which it pleaded in detail the facts concerning the growing, picking, handling, storing, shipping and marketing of lemons by the lemon industry in California in general, and by each of said defendants in particular, both before and since the promulgation of said Order No. 53, and the effect of the Order and the administration and application thereof on the business and property of each of the respective defendants and the growers affiliated therewith, and averred and claimed that Order No. 53 and the orders of the Secretary implementing it, both on their face and as applied and administered by the Secretary and his Agents, were and are unreasonable,

arbitrary, unjust and discriminatory as against the respective defendants, and constitute an unwarranted and unlawful exercise of the police powers and are violative of the Fifth Amendment to the Constitution of the United States, in that they deprive each respective defendant of its property without due process of law [Ans. La Verne, Pars. XII and XIII of Spec. Defense, R. 49-51].

The Court refused to consider this defense, denied defendants the right to establish the same and excluded all offers of proof made by defendants for that purpose [see Proceedings at Trial, *infra* p. 10]. This is assigned as error herein [Specifications of Errors Nos, 1-2-3, *infra* p. 21].

C. STIPULATIONS OF FACT.

Two written Stipulations of Fact were entered into by the parties [R. 118-129], and thereafter received in evidence on behalf of defendants [R. 241]. The facts stipulated to were almost entirely concerned with certain allegations of the special defense in defendant's answer. None of the facts so stipulated to were considered by the lower court to be of any materiality or consequence in the decision of said cause, except the Stipulation [R. 124] as to the total quantity of lemons which might lawfully be handled in interstate commerce for said weekly regulation period commencing June 1, 1941, and the number of packed boxes which might lawfully be handled and shipped by the defendant under its allotment during that period. One of the findings of the Court is in accordance with this particular stipulation. The remaining facts stipulated to in said stipulations are in no wise considered in the Findings.

D. THE PRE-TRIAL CONFERENCE.

A pre-trial conference was held on December 18, 1941. Certain rulings of consequence were made at this conference, but no independent record of said rulings was made or kept [R. 116]. However, said rulings were referred to and again made and adhered to at the trial, as will hereafter appear.

E. PROCEEDINGS AT THE TRIAL.

At the commencement of the trial [R. 131] Counsel for defendant reminded the Court of its

“ruling on the pre-trial hearing that the actual taking of evidence would not be permitted”

and accordingly that he had prepared his offers of proof. To this, the Court responded [R. 132]:

“The Court: Yes. At our pre-trial conference I ruled that the defendants be held to follow their administrative remedy and that in these actions the court would not receive evidence on the sufficiency of the evidence before the Secretary of Agriculture. As I understand, Judge Crump, under your theory it would be virtually a trial *de novo* of the questions that were before the Secretary of Agriculture.”

Counsel responded [R. 132] that he was not contending for a trial *de novo* of the questions before the Secretary, but that defendants were attacking the constitutionality of the Order, both as written, and as it necessarily operates, on the ground that it deprives them of their property without due process of law, and that it is discriminatory and confiscatory; and that the evidence which defendants proposed to offer would go to substantiate such contentions.

The Court adhered to the ruling that it would refuse to consider or receive any evidence to sustain the special defenses in the answers. Thus, the Court said [R. 153]:

“The Court: It seems to me that inasmuch as the court at the pre-trial conference, of which there is no record at this time, as far as the files are concerned, held that the defendants would have to pursue their administrative remedy and that the court was not going to receive evidence as set forth in the special defenses here, that an offer of proof should be sufficient without the necessity of calling the witnesses to the stand. However, the court is very much interested in these offers of proof, and if the court should, during the proceeding, determine that it desires to hear certain evidence, then I will so indicate to counsel, and such witnesses may be placed on the stand.”

At no time did the Court indicate that it would receive any such evidence, but at all times adhered to its ruling that defendants were confined to their administrative remedy, review of the Secretary's ruling under Sec. 608(c) (15)(A) and (B) of Title 7 U. S. C. A. Such adherence is evidenced by certain language of the Court in its opinion at the close of the case reading as follows [R. 252]:

“It further appears to me that the Act provides for an exclusive remedy of review, which excludes all other judicial intervention.”

The admissions in the Answer and certain stipulations at the trial were sufficient to establish the following facts:

1. That Order No. 53 was in fact made and issued by the Secretary.

2. That in pursuance of the provisions of the Order a Lemon Administrative Committee was appointed and acted as such.

3. That, in pursuance of the Order and on the recommendation of the Committee the Secretary fixed certain allotments prescribing the quantity of lemons that might be shipped by each of said respective defendants during the weekly regulation periods set forth in the complaint.

4. That, during one or more of such regulation periods, each of the defendants shipped in interstate or foreign commerce, a quantity of lemons in excess of the quantity so allowed to it for such period; and that

5. At the commencement of the instant proceeding there was pending before the Secretary a petition on behalf of defendants for a review under Section 608(c) (15)(A), Title 7 U. S. C. A. praying for a modification or exemption from Order No. 53, which petition was dismissed by the Secretary and there is now pending in the District Court of the United States for the Southern District of California, Central Division, an action by defendants pursuant to Section 608(c)(15)(B), Title 7 U. S. C. A.

The plaintiff, United States of America offered in evidence a transcript of the proceedings before the Secretary of Agriculture on the hearing upon which Order No. 53 was based. The Court, of its own motion, denied the offer and excluded the evidence [R. 152].

This closed the case for the plaintiff.

F. DEFENDANTS' CASE.

It was stipulated that all evidence offered or received should apply to each and all of the consolidated cases on trial [R. 142].

Defendant's Counsel then made certain offers of proof. He preceded these offers by the statement that the evidence was offered [R. 180]:

“* * * to prove that by reason of the allegations of the respective answers, in the affirmative portions of the answers, that Order No. 53, and the Orders of the Secretary supplementing said Order, all and each thereof is unjust, unreasonable, arbitrary and discriminatory as to the respective defendants, and this said Order and the Orders of the Secretary supplementing said Order, each and all constitute an unwarranted and unlawful exercise of the police powers, and are violative of the Fifth Amendment of the Constitution of the United States in that they deprive the respective defendants of their property without due process of law.”

It was stipulated and accepted by the Court that Counsel's statements as to what he proposed to prove might stand for all offers and witnesses and need not be repeated [R. 181].

Defendant's Counsel then called some seven witnesses and after certain preliminary questions of identification, etc., stated in detail the facts which he offered and proposed to prove by each respective witness. Such facts are set forth in full in the transcript and cover 85 pages thereof [R. 156-241]. In addition, there were offered 11 written exhibits, consisting of summaries, schedules, etc., referred to in the offered testimony. These exhibits are set forth in

full in the transcript and cover 37 pages thereof [R. 256-293].

The Court adhered to its pre-trial ruling and refused to admit or consider any of the offered evidence [R. 243].

In its opinion, the Court said [R. 248-249]:

“The defendants claim that said Order is arbitrary, unreasonable, unjust, and discriminatory, and violative of their constitutional rights. The defendants have offered evidence in support of said affirmative defenses, and the sole question now before the Court is a determination of the admissibility of this evidence.

“I am of the opinion that such evidence is not admissible.”

The ruling of the Court refusing to admit the offered evidence is assigned as error herein (Spec. of Error Nos. 2 and 3, *infra* p. 21).

G. THE FINDINGS OF FACT.

The material findings [R. 64] are to the effect that the Secretary, after a public hearing, of which notice to all interested parties, including defendants, had been given, issued Order No. 53, effective April 10, 1941, and continuously thereafter [Finds. IV-V, R. 66]; that subsequent to said effective date, the Secretary established a Lemon Administrative Committee which has at all times since exercised the powers and performed the duties prescribed by the Act [Find. VII, R. 70]; that each of the defendants is a handler of lemons as that term is defined in the Order [Find. VIII, R. 71]; that at the commencement of the instant proceedings there was pending before said Secretary, on behalf of defendants, a petition for

review under certain provisions of the Act, viz., Section 608(c)(15)(A) of Title 7 U. S. C. A., praying for a modification of or exemptions from Order No. 53; that said petition has been dismissed by the Secretary and there is now pending in the U. S. District Court, for the Southern District of California, Central Division, an action by the defendants to review the ruling of the Secretary pursuant to certain provisions of said Act, viz., Section 608(c)(15)(B) of Title 7, U. S. C. A. [Find. IX, R. 71]; that the respective defendants filed written applications for prorated bases and allotments with said Committee [Find. X, R. 71]; that the Secretary fixed a prorated base, established a weekly regulation period and fixed the quantity of lemons which could be shipped during said regulation period by each of the defendants; that each of the defendants, during said period, shipped in interstate commerce a quantity of lemons in excess of the quantity fixed by the allotment of the Secretary [Find. XI, R. 71-72]; that each of the defendants has refused to comply with the terms of the Order [Find. XII, R. 73].

Concerning Finding X [R. 71] as to the filing by the defendants with the Committee of written applications for a prorated base and for allotments, this finding is based solely upon a written Stipulation of Facts to that effect, but the stipulation expressly provides that all applications and other papers filed with the Committee were filed *under protest*, and with express reservation of any rights of said defendants [R. 128]. Except to this extent, appellants do not attack any of the aforesaid Findings I to XII, inclusive, as not being supported by the evidence or stipulations.

Finding No. XIII [R. 73].

This finding is to the effect that the non-compliance of defendants with the provisions of Order No. 53 will be injurious to interstate and foreign commerce and to growers, handlers and consumers of lemons, and threatens the stability of such commerce, which will incite other handlers of lemons to violate said Order and other subsequent Orders of the Secretary. Such violations will tend to thwart the National Policy of improving the marketing conditions concerning the handling of lemons in interstate and foreign commerce.

This finding is attacked as having no evidence to support it [Stat. of Points No. 6, R. 297; Spec. of Error No. 9, *infra* p. 22].

H. THE CONCLUSIONS OF LAW.

The material conclusions of law of the lower Court [R. 73] are to the following effect:

That in so far as the present action is concerned, the following CONCLUSIVE PRESUMPTIONS apply and are binding and controlling on the Court, to-wit:

1. That the notice given by the Secretary with respect to the hearing on the proposed Order regulating the handling of lemons was duly and regularly made and is valid;

2. That the hearing was held in accordance with said notice and General Regulations, Series A No. 1 of the Agricultural Adjustment Administration of the Department of Agriculture, and all interested persons, including defendants, were afforded full opportunity to be heard concerning said proposed Order;

3. “* * * that the Secretary found from the evidence introduced at said hearing and the record thereof,—” [R. 741].

The conclusion here quotes verbatim the findings of the Secretary contained in and a part of Order No. 53 [Exhibit "A" of complaint, attached to transcript in pamphlet form] to the effect that the terms and provisions of Order No. 53 tend to effectuate the declared policy of the Act; the portion of the Order quoted being the seven findings commencing with Finding "(1)" on page 2 of said pamphlet and ending with Finding "(4)" on page 3 thereof;

(NOTE: It will be noted that the Court does not, itself, attempt to find any facts, but merely concludes that it is conclusively presumed that the Secretary did so find.)

4. That the establishment of the Lemon Administrative Committee and the selection of its members is in accordance with law and is valid, and that said Committee has exercised only the powers and performed the duties given and required by law [R. 77]; this conclusion is assigned as error [Spec. of Error No. 4, *infra* p. 21];

5. That the prorate bases issued to each of the defendants were regularly made and are valid [R. 78]. This conclusion is assigned as error [Spec. of Error No. 5, *infra* p. 21];

6. That the allotments issued to each of the defendants were regularly made and are valid [R. 78]; this conclusion is assigned as error [Spec. of Error No. 6, *infra* p. 22].

The Court further concluded as a matter of law that the shipments by each defendant of lemons grown in California in excess of their respective allotments was in violation of law [R. 78]. This conclusion is assigned as error

[Spec. of Error No. 7, *infra* p. 22]. The final conclusion [R. 78] is that plaintiff is entitled to a permanent injunction restraining defendants, and each of them, their officers, agents, etc., from handling lemons in violation of said Order No. 53, and to a judgment for costs. This conclusion is assigned as error [Spec. of Error No. 8, *infra* p. 22].

(NOTE: It will be noted that there is no finding of fact, nor is there any conclusion of law, directed to any of the allegations of fact contained in the special affirmative defenses of the answer, or to any of the issues raised by such special defense.)

I. THE JUDGMENTS.

Final judgments, entitled "DECREE FOR PERMANENT INJUNCTION" were made and entered in each of the five cases. In these judgments the respective defendants, their officers, agents, employees, etc., are restrained and enjoined from handling or shipping lemons grown in California or Arizona in interstate or foreign commerce with Canada, in violation of or contrary to the terms and provisions of said Order No. 53 until further order of this Court, or until such time as an order or judgment may be entered by said U. S. District Court in the action brought by the defendants for a review of the Secretary's denial of their petition filed pursuant to sub-section (15) of Section 608(c), Title 7, U. S. C. A., which shall determine that said Order No. 53 is invalid or inapplicable to the plaintiff's in said action [R. 80-92-95-98-101]. Judgment is also given plaintiff for costs.

Statement of Questions Involved.

The questions involved are:

1. In a proceeding under Sec. 8(a)(6) of the Act (U. S. C. A. Title 7, Sec. 608(a)(6)) in which the United States of America, as Plaintiff, is seeking a permanent injunction restraining defendant (a handler of lemons) from violating the provisions of an Order of the Secretary of Agriculture, regulating the handling and shipping of lemons, issued pursuant to said Act, has such defendant the right to plead and urge, as a defense to such action, that said Order, as to him, both on its face and in its necessary administration and application, is unreasonable, unjust, discriminatory and confiscatory to such extent as to deprive him of his property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

2. Under such circumstances is it true that the only remedy available to such handler in or by which he may urge such defense is by a proceeding for a modification of or exemption from such order and a review of the Secretary's ruling thereon by the District Court of the United States, all under the provisions of Sec. 608(c)(15)(A) and Sec. 608(c)(15)(B) of Title 7 U. S. C. A.?

3. Did the Court err in holding that Order No. 53 and the actions and conduct of the Secretary of Agriculture and his agents in the application and administration of said Order were, in these injunction proceedings, conclusively presumed to be constitutional and valid, and that the defendants had no right to question the constitutionality or validity of said Order or said actions or conduct?

4. Did the Court err in precluding and preventing the defendants from introducing evidence to prove or establish

the facts alleged in their respective answers, and especially in the special defenses therein set forth?

5. Did the Court err in holding and concluding, as a matter of law, that the following conclusive presumptions applied and were controlling in these injunction proceedings:

A. That said Lemon Administrative Committee has, at all times, legally exercised only the powers and performed the duties given and required by law;

B. That the prorate bases issued to each of the defendants were regularly made and were valid;

C. That the allotments issued to each of the defendants had been regularly made and were valid;

D. That the shipment by each of said defendants of lemons grown in California for interstate and foreign commerce, in excess of their respective allotments were in violation of law;

E. In holding and concluding that the plaintiff is entitled to a permanent injunction restraining defendants, and each of them, their officers, agents, employees, etc., from handling lemons in violation of the Order.

6. Is there substantial evidence to support the finding that the non-compliance by defendants with Order No. 53

A. Was or would be injurious to interstate or foreign commerce; or

B. Was or would be injurious to growers, handlers or consumers of lemons; or

C. Did or would threaten the stability of interstate or foreign commerce in lemons; or

D. Did or would tend to thwart the National Policy of improving the marketing conditions in the handling of lemons in interstate or foreign commerce.

Specification of Errors.

The Court erred:

1. In holding that Order No. 53 and the actions and conduct of the Secretary of Agriculture, and his agents (in particular, the Lemon Administrative Committee) in the application and administration of the Order were, in these injunction proceedings, conclusively presumed to be constitutional and valid, and that these appealing defendants, and each of them, had no right to question the constitutionality or validity of the Order, or said actions or conduct.

2. In precluding and preventing these appealing defendants, and each of them, from introducing evidence to prove or establish the facts alleged in their respective answers, and especially in the special defenses therein set forth.

3. In precluding and preventing these appealing defendants, and each of them, from introducing the testimony and evidence specifically detailed in the several offers of proof made by these appealing defendants at the trial.

4. In holding and concluding as matter of law [Con. No. VI, R. 77] that, as to this particular proceeding, it is conclusively presumed that the Lemon Administrative Committee has, at all times, legally exercised only the powers and performed the duties given and required by law.

5. In holding and concluding as matter of law [Con. No. VII, R. 77] that the prorated bases issued to each of the defendants, in so far as this particular action is concerned,

are conclusively presumed to have been regularly made and are valid.

6. In holding and concluding as matter of law [Con. No. VIII, R. 78] that the allotments issued to each of the defendants, in so far as this particular form of action is concerned, are conclusively presumed to have been regularly made and are valid.

7. In holding and concluding as matter of law [Con. No. IX, R. 78] that the shipment by each of said defendants of lemons grown in the State of California for interstate commerce, in excess of their respective said allotments, was in violation of law.

8. In holding and concluding as matter of law [Con. No. X, R. 78] that the United States of America is entitled to a permanent injunction restraining the defendants, and each of them, their officers, agents, employees, etc., from handling lemons in violation of the terms and provisions of Order No. 53.

9. The evidence is insufficient to sustain Finding of Fact No. XIII [R. 73], in this, that there was no evidence to prove that the non-compliance by defendants with Order No. 53

- A. Was or would be injurious to interstate or foreign commerce; or
- B. Was or would be injurious to growers, handlers or consumers of lemons; or
- C. Did or would threaten the stability of interstate or foreign commerce in lemons; or
- D. Did or would tend to thwart the National Policy of improving the marketing conditions in the handling of lemons in interstate or foreign commerce.

ARGUMENT.

I.

The District Court Erred in Holding Order No. 53 Must Be Conclusively Presumed to Be Constitutional and Valid and That Defendants Have No Right to Question Its Constitutionality. Also in Precluding and Preventing Defendants From Introducing Evidence to Prove the Facts Alleged in Their Respective Answers and Especially in the Separate Defenses Therein Set Forth.¹

The basis for the judgments of the District Court is found in the following from its opinion:

“It is a cardinal principal of administrative law, that the administrative remedy must be followed and judicial relief will not be granted before the prescribed administrative remedy has been exhausted.

* * * * *

If I am correct in my viewpoint the legality of the order can only be questioned in a district court under the provisions of said Section 608c (15).”

In reaching its conclusion that the defendants could not raise constitutional questions in the injunction cases before it, the District Court relied upon the cases of

Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 82 L. Ed. 1408;

Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 82 L. Ed. 683;

Rochester Telephone Corporation v. United States, 107 U. S. 125, 83 L. Ed. 1147;

¹Specifications of Error 1 to 8 inclusive.

United States v. Superior Court, 19 Cal. (2d) 189;

Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573, 84 L. Ed. 1368, and 311 U. S. 570, 85 L. Ed. 358;

none of which cases support the conclusion. In so far as they are pertinent here, they are to the contrary.

In *Federal Power Commission v. Metropolitan Edison Co.*, *supra*, the Supreme Court said that upon an application by the Federal Power Commission for the enforcement of its order "respondents would have full opportunity to contest its validity." (304 U. S. p. 386, 82 L. Ed. p. 1415.) In other words, on an application by the commission to the court to enforce its order, the validity of the order is a proper subject for inquiry.

Myers v. Bethlehem Shipbuilding Corporation, *supra*, reached the Supreme Court on certiorari to the Circuit Court of Appeals for the First Circuit to review decrees affirming decrees of the United States District Court of the District of Massachusetts enjoining, at the suit of an employer and of employees of such employer, the holding of a hearing by the National Labor Relations Board. This case might be in point if the defendants in these cases had sought by injunction proceedings to restrain the Secretary of Agriculture from holding a hearing, but it has no application in a case brought by the United States to enforce the order of the Secretary, where the order is attacked on constitutional grounds.

Rochester Telephone Corporation v. United States, *supra*, was an appeal from a decree of the District Court of the United States for the Western District of New York dismissing on the merits a bill to review an order

of the Federal Communications Commission requiring the disclosure of certain information. Since this was a proceeding instituted as a review of an order of the commission, we are unable to see how the case supports the views expressed in the opinion of the learned District Judge.

United States v. Superior Court, supra, was an original proceeding in the Supreme Court of California, whereby the United States sought to prohibit the Superior Court of Los Angeles County from taking action in a suit pending before it which was brought by certain shippers and handlers of oranges to enjoin the enforcement of an order issued by the United States Secretary of Agriculture. It might be in point had the defendants in the instant cases sought an injunction against the enforcement of Order No. 53 before the completion of the review proceedings under Title 7, U. S. C. A., Section 608c (15), and without showing the inadequacy of the administrative remedy, arising from threatened irremedial injury (19 Cal. (2d) at pages 196-197.) It does not, however, support the proposition that where persons are brought into court as defendants that they are not entitled to attack the constitutionality of an order by way of defense.

National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra, originated with a petition of the National Labor Relations Board for the enforcement of its order requiring an employer to cease and desist from discriminating against members of a labor organization with regard to hire, tenure of employment, etc. In the course of its opinion the Supreme Court said:

“Any person aggrieved by a final order of the Board may obtain a review in the designated courts

with the same procedure as in the case of an application by the Board for the enforcement of its order.” (301 U. S. 24, 81 L. Ed. 901.)

In the present cases we have challenged the constitutionality of Order No. 53, and in the *Jones* case (which was instituted by the Labor Board to enforce its order) the respondents challenged the constitutionality of the Act there in question. The Supreme Court found no fault with this procedure. On the contrary, the opinion says that if respondent’s contention were correct, “the Act would necessarily fall by reason of the limitations upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservations of the Tenth Amendment.” (301 U. S. 29, 30, 81 L. Ed. 907.)

It will be noted that although the National Labor Relations Act of 1935 provides for a review of the final order of the board, *Jones & Laughlin Steel Corporation* did not seek a review. The constitutional questions were raised in that case by an affirmative defense to petitions of the National Labor Relations Board seeking the enforcement of its orders. In the pending cases the constitutional questions were raised in the same manner, that is to say, by affirmative defenses to the complaints filed at the instance of the Department of Agriculture to enforce its order.

The learned Judge of the District Court cites the two cases of *Railroad Commission of Texas v. Rowan & Nichols Oil Co.* as supporting him in his conclusion that a judgment denying the government injunctive relief would have the effect of annulling Order No. 53 and his

conclusion that the defendants could with impunity ignore their administrative remedy if permitted to introduce evidence in the pending cases. Also that to grant them relief in these cases would, in effect, grant to them judicial relief prior to the exhaustion of their administrative remedies, and would in effect permit the court in these cases to try the cases presented to the Secretary of Agriculture on the review proceedings and substitute the opinion of the Judge of the District Court for that of the Secretary of Agriculture, which, he says, would be in direct conflict with the legislative intent. [R. p. 253.]

We do not so construe the decisions which the Judge of the District Court relies on. The *Rowan* cases were brought by the company to enjoin the Railroad Commission of the State of Texas from carrying into effect a proration program for oil, whereas, the instant cases were instituted by the government under the provisions of Title 7, Section 608a (6), which provides:

“The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.”

In the *Rowan & Nichols* cases it appeared that the Railroad Commission of Texas had issued its proration order covering the East Texas oil field, where respondents' wells were located; that thereupon the Rowan & Nichols Oil Company sought and obtained a decree from the United States District Court enjoining the commission from carrying its proration plan into effect, which

decree, with irrelevant modifications, was affirmed by the Circuit Court of Appeals. The gist of the opinion of the Supreme Court is that courts should not substitute their own conception of the fairness and reasonableness of a challenged order of a state commission for that of such commission, where there is a conflict in the evidence or, rather, where there is evidence to support the ruling of the commission. The point does not seem to have been made that the oil company had not exhausted its administrative remedy before bringing its suit in the United States District Court.

In his opinion in the instant cases the District Judge quotes from Title 7, Section 608a (6) U. S. C. A., as follows:

“The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore, or hereafter made, or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said Courts.”

“I believe,” he said, “it was the intention of Congress under said provision to limit the jurisdiction of the District Court to enforce and prevent violations of any order, regulation, or agreement made or issued pursuant to the Agricultural Adjustment Act. I believe the use of the word ‘specifically’ is of special significance and limits this court’s jurisdiction to the precise things therein designated. I think said section is a limitation upon rather than a grant of power.”

It is apparent to us that the word “specifically” and the construction of the Act which follows in the opinion of the District Court is entirely wrong.

If the District Court were correct, then the Act would deprive defendants of their property without due process of law. It is clear to us that the words “specifically to enforce” have their customary and well-recognized meaning in law, *i. e.*, specific performance. What the Congress intended was to provide a means of enforcing a valid order by the District Courts, not to limit their jurisdiction. The procedure is analogous to that provided with respect to the orders of other administrative agencies, such as the National Labor Relations Board (vide Title 29, Sec. 160(e), U. S. C. A.), just as the review proceedings authorized by Title 7, Sec. 608c (15) (A) and (B) with respect to orders of the Secretary of Agriculture are generally similar to the review proceedings provided in Title 29, Sec. 160 (f), U. S. C. A. with respect to orders of the National Labor Relations Board.

There is, however, this prime difference between the two acts with respect to reviews: Section 160 (g) of the National Labor Relations Act provides:

“The commencement of proceedings under said Section (e) or (f) shall not, *unless specifically ordered by the court*, operate as a stay of the Board’s order.” (Emphasis added.)

There is no similar provision in the Agricultural Marketing Act.

It has repeatedly been held that where either the provisions of a statute or the decisions of the court interpreting a statute preclude a supersedeas or stay until the

legislative process is completed by the final action of the reviewing court, due process is not afforded.

Porter v. Investors Syndicate, 286 U. S. 461, 470-471, 76 L. Ed. 1226, 1232, 53 S. Ct. 132;

Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U. S. 196, 201, 68 L. Ed. 975, 979, 44 S. Ct. 553;

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353;

United States v. Illinois Central R. Co., 291 U. S. 457, 461, 78 L. Ed. 909, 916.

A quotation from *Porter v. Investors Syndicate*, *supra*, is given in the Appendix, beginning on page 1.

If the trial Judge is correct in his ruling, then a person may be ordered by the courts, at the behest of the administrative agency, to obey any order which such agency may see fit to make, no matter how patently invalid it is, and be utterly helpless to obtain redress pending final exhaustion of the administrative process for review, a process which may and sometimes does take years to complete.

Take the instant cases. Order No. 53 became effective on April 10, 1941 [R. p. 10]. When these cases were commenced there was pending on behalf of defendants a petition for review under Title 7, Sec. 608c (15) (A) U. S. C. A., praying for a modification of or exemption from Order No. 53, and there is still pending and not yet tried a proceeding in the United States District Court for the Southern District of California, for review, pursuant to Title 7, Sec. 608c (15) (B) U. S. C. A. [R. p. 71]. Had not the war intervened, with its resulting

tremendously increased prices for lemon concentrates and other by-products, defendants and their grower members might well have been utterly ruined before effective action could be had through the pursuit of their administrative remedies.

We cannot believe that the Congress intended to limit the powers of the federal courts by the provisions of the Act quoted in the opinion of the District Court. If it did, then its action is violative of the Fifth Amendment.

Section 608c (14) of Title 7, U. S. C. A., provides:

“Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than \$50 or more than \$500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant’s petition was filed with the Secretary, and the date upon which notice of the Secretary’s ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).”

Now, let us assume that after notice of the Secretary’s ruling denying defendant’s petition under section 608c(15) (A) was given and while a review was pending in the District Court under subsection (15) (B), the Government had instituted criminal proceedings seeking \$500 fines accu-

mulating daily, as provided in subsection (14), and let us assume that the order of the Secretary instituting a program for the marketing of lemons showed on its face that it was unquestionably outside of the purpose and scope of the act. Yet, if the District Court is correct, defendants could have been convicted and subjected to penalties without being permitted to introduce evidence for the purpose of proving the act to be unconstitutional. They could not even have introduced the transcript of the proceedings before the Secretary.

In *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, 80 L. Ed. 1209, plaintiffs appealed from a decree of the District Court of the United States for the Eastern District of Virginia, dismissing a suit to set aside an order of the Interstate Commerce Commission relating to the division among participating carriers of rates on Florida citrus fruit. While the Supreme Court affirmed the decree of the District Court on the merits, it held that inasmuch as the appellants were not given and could not obtain a hearing before the Commission upon the question of confiscation (298 U. S. 371, 80 L. Ed. 1225), they properly invoked judicial power to obtain constitutional protection against the Commission's order, saying:

"The District Court rightly held them entitled to introduce evidence in addition to that contained in the record before the Commission and rightly proceeded upon consideration of all the evidence to make findings and, upon the basis of the facts that it found, to decide upon the constitutional question."

Conceding that

"even where the statute sought to be applied and enforced by an administrative agency is challenged upon

constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief." (*United States v. Superior Court*, 19 Cal. (2d) at p. 195),

yet

"The inadequacy of the administrative remedy, arising from threatened irremedial injury, is a recognized ground for immediate injunctive relief, and, upon proof of that fact, the exhaustion requirement has frequently been held inapplicable." (19 Cal. (2d) at p. 196.)

Surely if persons affected by an unconstitutional administrative order may obtain injunctive relief in a suit brought for that purpose, where their administrative remedies are inadequate, there is much greater reason for permitting them to defend against the enforcement of an order on the ground that it is unconstitutional where they are brought into court unwillingly as defendants at the instance of an administrative agency which seeks the aid of the court to specifically enforce such order.

We have not found any decision in any jurisdiction which goes to the extent of denying the right of a defendant, in a suit brought to specifically enforce an order of an administrative agency, or restrain the violation thereof (which amounts to the same thing), to introduce evidence in support of his defense, where he challenges the validity of the order on constitutional grounds. In every case which we have examined where an administrative agency has sought the aid of the courts in enforcing its order, the defendants have been permitted to produce evidence to the effect that the order was violative of either state or federal constitution.

At the trial, the Assistant United States Attorney stated the Government's contention on this point, and a colloquy ensued between court and counsel, which is pertinent and enlightening.

"Mr. Worthington: May it please the court, in answering Judge Crump's argument, I submit that this court is a statutory court. It is not a constitutional court. Its right to decide constitutional questions are those given to it by Congress. Congress can subsequently limit, in specific instances, the right of this court to try constitutional questions. And I submit, in this particular one Congress has in fact placed a limitation on the district courts, where an action is brought by the Government for violation of (122) this particular statute, from going into that constitutional question. And the remedy in these cases is to proceed before the Secretary of Agriculture, and on denial they can go to the district court for review.

The Court: I don't see where you and Judge Crump are apart at all.

Mr. Crump: Well, we are apart on this proposition: That this court has no right to go into constitutional questions. I don't say that for a minute. I think that inherent and embraced in the act itself is a valid order, in order that injunction may issue. But I was talking about procedure. Assuming that the court adhered to the procedure as outlined on the—

The Court: Do I understand, Mr. Worthington, that this court has the right to go into the question as to whether the order of the Secretary is a proper order, unless it complies with an act of Congress?

Mr. Worthington: Using the term 'this court' advisedly. That is, this court is sitting simply to hear

and determine proceedings brought by the Government to restrain violation of the order; yes, sir.

The Court: I would like to have your authorities on that. As I understand, if there is an act of Congress in dispute, the court still can pass upon it, but the appeal is directly to the Supreme Court. In questions of constitutionality in the state law they call in two extra judges. But you mean to say that I must accept any order that the Secretary of Agriculture puts out, and say that notwithstanding if it is made in a conflict with the statute which provides for it on the face of it, I still have to accept it?

Mr. Worthington: We first—

The Court: I am asking that question.

Mr. Worthington: Yes, sir, your Honor, when the case before you is nothing else than a petition of the Government for a re- (123) straining order and a violation of that order.

The Court: Where is your authority?

Mr. Worthington: *There is no authority for it.*
(Emphasis added.)

The Court: Then, on what do you base that?

Mr. Worthington: On the authority that this court is a statutory court; that the court has no right to try constitutional questions, except that Congress has given it that right. But it comes now with a special right in a particular instance. It has provided a separate tribunal, and that is before the Secretary of Agriculture, where the parties think they have been injured by the action of the Secretary, pursuant to an act of Congress, can proceed and their entire rights may be heard and determined before the Secretary of Agriculture. And if the Secretary of Agriculture goes against them they have a right

to go into the district court and have all questions of law determined by the district court. The action that we are proceeding under is separate and distinct entirely. It simply provides protection to the Government. Otherwise, to grant Judge Crump's contention would be that the defendants could go ahead and violate the statute without paying any attention to it whatever, and when the Government attempted to stop them they would come in and plead the Government's action against them contrary to what the statute has provided. They wouldn't have to proceed at all. Congress has provided a definite method of procedure for them.

The Court: Well, you proceed with your case. What evidence have you to offer? Have you got any evidence to support it?

Mr. Worthington: Not as far as counsel's statement is concerned, but I would like to offer a transcript before the Secretary of Agriculture—

Mr. Crump: Will you pardon me a moment?

Mr. Worthington: Yes.

Mr. Crump: Just one word with respect to this argument of Mr. Worthington: Here again we are faced with this difficulty of (124) having adverse ruling, and according to Mr. Worthington the constitutional questions must be presented to the Secretary of Agriculture, which means that the Secretary, according to the Government's argument, is vested with the authority to determine whether his own acts are constitutional. That goes way beyond what the Secretary of Agriculture says himself, because in the hearing before the Secretary of Agriculture he ruled that all constitutional questions (were) was for the court and not for the Secretary. Now, if the Secretary ruled that the court must do it, and the

Government says that the Secretary must do it, and neither one of them does it, then we can't have any ruling on constitutional questions at all.

Mr. Worthington: I don't think the court got from my statement that the Secretary would pass on the constitutional questions.

The Court: Who would pass on it?

Mr. Worthington: The United States District Court would pass on it in the review proceedings. I am not for one moment suggesting that the Secretary of Agriculture rule on constitutional questions." [R. pp. 148-151.]

We can see no valid basis for the position of the Government relative to the ruling of the District Court. Why should defendants be *required* to introduce their evidence concerning constitutional questions in a hearing before the Secretary of Agriculture, when the Secretary will not and cannot pass on such questions? Why should the Government be permitted specifically to enforce an invalid order, which, being invalid, is no order at all? And, for purposes of this appeal, we submit that this court should assume that the District Court might properly have held, after hearing the testimony and examining the documentary evidence (including that introduced before the Secretary of Agriculture) that the order was invalid. At least the defendants are entitled to have the trial court consider and pass on the evidence and to a decision on the merits.

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous ruling of law was applied; and whether the proceeding in which facts were adjudicated was

conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to an independent judgment of a court on the ultimate question of constitutionality.”

St. Joseph Stock Yards Co. v. United States,
298 U. S. 38, 84; 80 L. Ed. 1053, 1058.

We submit that the “some court” for such decision is the United States District Court, and that the instant cases afford the proper opportunity.

No good purpose would be served by attempting an argument on the merits in these cases at this time, and we shall make none. But we direct attention to the fact that considerable evidence relating to the constitutional questions was introduced in the hearings before the Secretary, which was supplemented by additional evidence offered and refused admission by the District Court in these cases.

The Congress cannot require or authorize the United States District Court to execute or enforce *any* order that the Secretary of Agriculture or other administrative agency may assume to make. (*Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 613-614.)

(For quotation from the opinion see Appendix.)

II.

The Evidence Is Insufficient to Sustain Finding of Fact Number XIII [R. 73] in This, That There Was No Evidence to Prove That the Non-Compliance by Defendants With Order No. 53:

- A. WAS OR WOULD BE INJURIOUS TO INTERSTATE OR FOREIGN COMMERCE; OR
- B. WAS OR WOULD BE INJURIOUS TO GROWERS, HANDLERS OR CONSUMERS OF LEMONS; OR
- C. DID OR WOULD THREATEN THE STABILITY OF INTERSTATE OR FOREIGN COMMERCE IN LEMONS; OR
- D. DID OR WOULD TEND TO THWART THE NATIONAL POLICY OF IMPROVING THE MARKETING CONDITIONS IN THE HANDLING OF LEMONS IN INTERSTATE OR FOREIGN COMMERCE.²

The only evidence received consisted of two stipulations of fact. Neither of these stipulations supports Finding XIII in the *LaVerne* case and similar findings in the other cases.

It follows that the finding is not supported by any evidence, unless we accept Conclusion Number VI [R. p. 77] as being equivalent to evidence.

In that Conclusion the court held, as a matter of law, that in these proceedings it is conclusively presumed that the Lemon Administrative Committee has at all times legally exercised the powers and performed the duties given and required by law.

²Specification of Error 6.

III.

The Court Erred in Holding and Concluding as a Matter of Law [Conclusion Number VI, R. 77] That as to These Proceedings It Is Conclusively Presumed the Administrative Committee Has at All Times Legally Exercised Only the Powers and Performed the Duties Given and Required by Law.³

In addition to what we have said on this subject under Heading I of the argument, we would add that while there is a presumption that an order of an administrative agency is valid and within the jurisdiction of the agency, *such presumption is not conclusive*. Authorities might be multiplied, but it is sufficient in this connection to quote the language of Chief Justice Hughes, delivering the opinion of the court in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51-52, 80 L. Ed. p. 1041, which we do in the Appendix.

Conclusion.

For the reasons stated, the decrees of the United States District Court should be reversed and the cases remanded with instructions to proceed with the trial of the cases on their merits, with the right to defendants to introduce evidence in support of their constitutional defenses.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorney for Appellants.

³Specification of Error 4.

APPENDIX.

Porter v. Investors Syndicate, 286 U. S. 461, at pp. 470-471; 76 L. Ed. 1226, at p. 1232:

“Where an ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co v. Lewis*, 241 U. S. 440, 454, 60 L. ed. 1084, 1098, 36 S. Ct. 637. But where either the plain provisions of the statute (*Pacific Teleph. & Teleg. Co. v. Kuykendall*, 265 U. S. 196, 203, 204, 68 L. ed. 975, 980, 981, 44 S. Ct. 553) or the decisions of the state court interpreting the act (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 67 L. ed. 659, 43 S. Ct. 353) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.”

Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. Reprtr. 567:

This was a proceeding to enforce an order of the Interstate Commerce Commission. Defendant attacked the order as invalid upon various grounds and in addition contended, as stated at page 587:

“Respondent submits that Congress cannot require or authorize this court to execute or enforce any order that said commission may assume to make; * * *”.

In determining that the power granted was not a non-judicial power, the court stated, pp. 613-614:

“The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendations or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties and obligations recognized and imposed by the act. It is neither a federal court under the constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. This federal commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce committed by the constitution to the exclusive care and jurisdiction of congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the states appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners invested with powers as ample and large as those conferred upon the federal commissioners, has not been successfully questioned when limited to that local or internal commerce over which the states have exclu-

sive jurisdiction; and no valid reason is season for doubting or questioning the authority of congress. under its sovereign and exclusive power to regulate commerce among the several states, to create like commissions for the purpose of supervising, investigating and reporting upon matters or complaints connected with or growing out of interstate commerce. What one sovereign may do in respect to matters within its exclusive control, the other may certainly do in respect to matters over which it has exclusive authority.

We are also clearly of the opinion, that this court is not made by the act the mere executioner of the commissioner's order or recommendation, so as to impose upon the court a non-judicial power. Congress has, in some cases. assigned to federal courts duties which, though of a *quasi* judicial nature, did not come within the judicial power granted in the constitution. Thus the act of March 23, 1792 (1 U. S. St. at Large, 243), required the circuit judges to examine into the claims of persons asking for pensions, and make report thereon to the secretary of war. The judges of the circuit courts for the districts of New York and Pennsylvania held that the function or duty thus imposed was not judicial. So the circuit court for the district of North Carolina declared that it could not execute that part of the act which required it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. *Hayburn's case*, 2 Dall 409. In *U. S. v. Ferreira*, 13 How. 40, which arose under the act of March 3, 1849, directing the judge of the district court of Northern Florida to adjudicate upon certain claims for injuries, and report the evidence thereon, the

supreme court held that the authority thus conferred was not 'authority to exercise any of the judicial powers of the United States under the constitution.' And the judge's decision was held not to be the judgment of a court of justice, but simply 'the award of a commissioner.' The principle announced in these cases would sustain counsel's position, if this court, under the provisions of the interstate commerce law, is limited and restricted to the mere ministerial duty of enforcing an order or requirement of the commission, whether it be regarded as a judicial or a non-judicial tribunal. But such is not, in fact, the jurisdiction which this court is called upon to exercise. The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause *de novo* upon proper pleadings and proof, the latter including non only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, at pp. 51-52; 80 L. Ed. 1033, at p. 1041:

"Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has

kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions."

No. 10266

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

LA VERNE COOPERATIVE CITRUS ASSOCIATION, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR THE UNITED STATES OF AMERICA

FILED

JUN 12 1943

PAUL F. O'BRIEN,
CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 10266

LA VERNE COOPERATIVE CITRUS ASSOCIATION, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR THE UNITED STATES OF AMERICA

OPINION BELOW

The unreported opinion of the District Court, together with its findings of fact and conclusions of law, is set forth in the record (R. 64, 248).

JURISDICTION

The judgments of the District Court in the five cases here on appeal were entered April 29, 1942 (R. 80, 92, 95, 98, 101). Notice of appeal in each case was filed July 27, 1942 (R. 298-302). The jurisdiction of this Court rests upon Section 128 of the Judicial Code, 28 U. S. C. (1940 ed.) 225.

CONSOLIDATION OF APPEALS

The five cases on appeal present substantially the same questions of law. They were consolidated for

trial below (R. 104), and have been consolidated on appeal by order of this Court (R. 322-325). The record contains a full transcript only of the proceedings in the *La Verne* case, which is typical of all the cases, and only excerpts from essential proceedings in the other cases.

THE JUDGMENTS IN THE DISTRICT COURT AND THE STATUTE
UNDER WHICH THE JUDGMENTS WERE ENTERED

The judgments of the District Court from which the appeals are taken enjoin the appellants, with certain qualifications hereinafter mentioned, from handling lemons in violation of Order No. 53, "Order Regulating the Handling of Lemons Grown in the States of California and Arizona." The lemon order was issued by the Secretary of Agriculture of the United States pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. (1940 ed.) 601 *et seq.* The Act reenacted, with amendments, many of the provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended from time to time, including the amendments of August 24, 1935, 49 Stat. 750.¹

The judgments were entered in an action instituted by the United States of America under Section 8a (6) of the Act. This section confers jurisdiction upon the District Courts to entertain enforcement proceedings to restrain handlers subject to any order issued under the Act from violating the provisions of the order.

¹ References in this brief are to sections of the Agricultural Adjustment Act of 1933 as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

At the time of the entry of the judgments there was pending in the District Court an action instituted by the appellants under Section 8c (15) (B) of the Act for judicial review of a ruling of the Secretary of Agriculture denying a petition filed with him by the appellants under Section 8c (15) (A) of the Act, in which the appellants contended that the lemon order was not in accordance with law, and asked to be exempted from the operation thereof. The injunctions against the appellants are, by their terms, to continue in force only until a final judgment is entered by the District Court in the review proceedings.

THE OPINION OF THE DISTRICT COURT

The District Court held that if the lemon order was valid on its face the only issue properly before it was whether the appellants had violated the provisions thereof, and that all other issues were appropriately triable only in the review proceeding. The court accordingly refused to receive and consider evidence offered by the appellants in support of their affirmative defenses charging that the lemon order discriminates against them and violates due process of law generally and particularly as applied to them (R. 248-255).

QUESTIONS PRESENTED

1. Whether the appellants, in this enforcement proceeding against them under Section 8a (6) of the Act, are, by virtue of the administrative and judicial review provided for in Section 8c (15) of the Act, limited solely to the issues of the fact of violation of the lemon order and the validity of the order *on its face*? Ap-

pellants contend that, if they are so limited, the Act in that respect is unconstitutional.

2. Whether, in the event it is held herein that issues relating to the validity of the lemon order may be raised by the appellants in this proceeding, the evidence proffered by the appellants and excluded by the District Court is sufficient to establish the invalidity of the order?

STATEMENT OF THE CASE

A. The Act and the lemon order

1. Generally

The Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1940 ed. 601 *et seq.*) directs the Secretary of Agriculture to issue, under conditions and in the manner prescribed in the Act, orders regulating the handling of specified commodities, including lemons, where such handling is in interstate or foreign commerce or directly burdens, obstructs, or affects such commerce (Act, Sec. 8c (1)). Section 8c (6) of the Act authorizes, *inter alia*, the inclusion, in orders applicable to fruits, of provisions regulating the quantity of fruit which may be marketed by all handlers thereof during any period, and the quantity which each handler may market during any period based upon the quantity which the handler has available for current shipment or, in the discretion of the Secretary, upon the quantity shipped by the handler during a prior representative period.

2. The issuance of the lemon order upon evidence taken at a public hearing

Pursuant to the authority granted by the Act, the Secretary of Agriculture during the fall of 1940 held

a public hearing, known as a promulgation hearing, with respect to a proposed order regulating the handling of lemons grown in the States of California and Arizona. All interested persons, including the appellants, were given notice of the hearing. The appellants attended, and were afforded an opportunity to be heard but were not permitted directly to cross-examine witnesses (R. 9, 26).

The Secretary on April 5, 1941, issued Order No. 53 (7 C. F. R. 953.1 *et seq.*), which became effective April 10, 1941 (R. 10, 26). As required by Section 8c (4) of the Act, the order was based upon evidence taken at the promulgation hearing (R. 67).

3. The provisions of the lemon order

The lemon order provides that the Secretary, upon the recommendation of the Lemon Administrative Committee, which is charged with the administration of the order, and the organization of which is provided for in the order, may limit the total quantity of California-Arizona lemons which all handlers may market in interstate commerce or in commerce with Canada during any week (Order, Sec. 953.4 (b), (c)). This total quantity is allotted among handlers in accordance with a "prorate base" for each handler which is determined bi-weekly by the Secretary, also upon recommendation of the Committee. The "prorate base" is the ratio which the quantity of lemons of each handler "available for current shipment" bears, at two-week intervals, to the total quantity of lemons available for current shipment from California and Arizona (Order, Sec. 953.4 (d), (e)).

The quantity of lemons which each handler has available for current shipment is measured by the quantity of lemons which each handler has picked from the trees and has assembled at an established shipping point within the area of production. However, if a handler shows the unavailability of facilities for storing or otherwise assembling, he may, nevertheless, have the quantity of his available lemons computed in an alternative manner and his prorata base determined accordingly (Order, Sec. 953.4 (d) (3), (5)).

A handler is permitted to exceed his weekly allotment by ten per centum or one carload, whichever is greater, but the allotment for the next succeeding week is reduced commensurately with the excess so handled. If a handler's allotment for any week is not filled, the unused portion may be carried over by the handler to the next succeeding week only. Allotments may be lent by one handler to another, subject to conditions specified in the order (Order, Sec. 953.4 (f), (g), (h)).

4. The provisions of the Act for administrative and judicial review

The Act provides, in Section 8c (15) (A), that any handler subject to an order who feels that all or part of an order, or any obligation imposed in connection therewith, is not in accordance with law, may file a written petition with the Secretary for a modification thereof or exemption therefrom. He must be granted a hearing upon the petition, after which the Secretary shall make a ruling thereon, and his ruling is final if in accordance with law.

In Section 8c (15) (B) of the Act, jurisdiction is conferred upon the District Courts of the United States to review the Secretary's ruling upon the filing of a bill in equity for that purpose by the handler. If the court determines that the Secretary's ruling is not in accordance with law, it is empowered to remand the proceedings to the Secretary with directions either to make such ruling as the court determines is in accordance with law, or to take such further proceedings as in the court's opinion the law requires.

5. The enforcement provisions of the Act

By Section 8a (6) of the Act, the District Courts are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order issued by the Secretary pursuant to the Act. And it is expressly provided in Section 8c (15) that the pendency of review proceedings thereunder shall not impede, hinder, or delay the United States or the Secretary from obtaining relief pursuant to Section 8a (6). Enforcement proceedings abate whenever a final decree has been rendered in review proceedings between the same parties, and covering the same subject matter (Act, Sec. 8c (15) (B)).

B. The proceedings in the District Court

1. The complaints

The complaint of the United States against each of the appellants recited past overshipments of lemons in violation of the lemon order and sought to enjoin further shipments of lemons in excess of the weekly

allotments (R. 7, 20-21). The complaint in each case was filed pursuant to Section 8a (6) of the Act.

The District Court found, as alleged in the complaints, that the lemon order was issued in compliance with the provisions of the Act (R. 8-10, 66-70) and that each of the appellants had violated the provisions of the lemon order in shipping lemons in excess of weekly allotments (R. 13-17, 71-73). The appellants do not dispute these findings (Appellants' Brief, p. 6).

The complaint in paragraph twenty-four alleged, and the court found, that further violations by the appellants of the lemon order would have an injurious effect on interstate commerce and would be inimical to the successful operation of the Act and the order (R. 18-20, 73). The appellants denied this allegation of the complaint (R. 42), and take issue with this finding of the court as being without support in the evidence (R. 297 and Appellants' Brief, p. 22). It is submitted by the appellee that the allegation and the finding are surplusage, and they were so regarded by the court below (R. 139).²

2. The special defenses, stipulations of facts, and proffers of proof

The appellants, in their several answers, contend that the lemon order discriminates against them and violates due process of law generally and particularly in its application to them (R. 33-51). The appellants sought to support these affirmative defenses by show-

² This is in accord with the views expressed by this Court in *American Fruit Growers v. United States*, 105 F. (2d) 722, 725 (C. C. A. (9th) 1939), involving an orange and grapefruit order issued under the Act.

ing the general nature of the lemon industry and the effect of the order upon their businesses. The facts relating to the general nature of the lemon industry are contained in stipulations between the parties (R. 118, 129). The evidence relating to the effect of the operation of the order upon the businesses of the appellants is contained in proffers of proof made by the appellants (R. 154-242). The court declined to consider the special defenses and to admit the evidence contained in the proffers of proof.

Generally speaking, the proffers are intended to show that, if the appellants continue their present manner of doing business, they will be adversely affected by the lemon order. It is the purpose of the evidence to prove specifically, in addition to the economic unwisdom of the order, (1) that the appellants cannot operate under the order without providing additional storage facilities; (2) that the appellants' sales are largely on private orders of an established trade, whereas the majority of other handlers sell largely in the auction markets, and, consequently, the appellants lose customers to such handlers, most of whom are members of the California Fruit Growers Exchange, whenever it happens that their allotments under the lemon order are insufficient to fill their trade orders; and (3) that appellants handle many tree ripe and other lemons which have a short storage life and which, in order to prevent spoilage, must be moved to the market before other types of lemons with a longer storage life.

3. Findings of fact

The District Court made findings of fact which were limited to the material allegations and some of the unnecessary allegations of paragraph twenty-four of the complaint. The court also found that there was pending before the Secretary, at the time of the commencement of the case at bar, a petition of the appellants for administrative relief under Section 8c (15) (A) of the Act (R. 71). The court did not make any finding with respect to any of the special affirmative defenses interposed by the appellants.

SUMMARY OF ARGUMENT

A. The provisions of the Agricultural Marketing Agreement Act of 1937 for administrative and judicial review of a marketing order issued by the Secretary of Agriculture and for enforcement of the order by the United States manifest a clear intention to confine the enforcement proceedings to the issues of the validity of the Act and order on their face, and of the fact of violation.

B. The appellants are not, in the circumstances of this case, deprived of due process of law by the injunction against violations pending final judgment by the District Court in the action instituted by them to review the ruling made by the Secretary of Agriculture on their petition for exemption from the operation of the lemon order. A stay *pendente lite* is a matter of administrative and judicial discretion, not of right.

C. The District Court did not err in refusing to consider the special affirmative defenses of the appellants or to admit the evidence proffered in support thereof.

But even if there was error, such error is not a ground for reversal, as the evidence does not demonstrate the invalidity of the lemon order.

D. The question of the economic unwisdom of the lemon order is for legislative or administrative and not judicial determination.

E. The evidence proffered by the appellants in support of their special affirmative defenses does not show discrimination against them in the operation of the lemon order. The evidence does not show that the appellants are treated differently from other handlers subject to the order. Nor does such evidence show any attempt on the part of the appellants to alleviate their alleged hardships by invoking the special machinery provided by the order for the benefit of handlers without storage facilities. The Fifth Amendment to the Constitution, unlike the Fourteenth Amendment, does not protect against discrimination.

ARGUMENT

I. Evidence proffered by the appellants in support of their special defenses was properly excluded

A. The trial court merely followed the direction of the Act

When Sections 8a (6) and 8c (15) of the Act are read together, the statutory scheme carefully designed in the interest of orderly review and prompt enforcement becomes apparent. Under Section 8c (15) any person, including appellants, affected by an order is afforded an administrative hearing and a judicial review at which he may obtain such interlocutory and permanent relief as he may be entitled to by law. Section 8a (6) confers jurisdiction on

the District Court specifically to enforce orders and to enjoin violations thereof. Having provided in Section 8c (15) an orderly procedure for obtaining judicial review of questions pertaining to the order, the Congress should not be presumed to have intended that this procedure might be circumvented in the course of proceedings under Section 8a (6). Such an interpretation would violate the canons of statutory construction and conflict with fundamental rules of administrative law requiring exhaustion of the administrative remedy as a condition of resort to the courts.

Any interpretation of Section 8a (6) as permitting a plenary proceeding in which all questions pertaining to an order may be considered would be inconsistent with the interim nature of the relief to which the Government is entitled under that section. It is provided in Section 8c (15) that enforcement proceedings brought pursuant to Section 8a (6) shall abate when a final decree has been rendered in review proceedings between the same parties brought pursuant to Section 8c (15) and covering the same subject matter. If all questions may be raised and decided in the enforcement proceeding, it would be pointless to have the decree therein abate when a final decree is rendered in the review proceedings. A construction which would make the statute ridiculous is to be avoided.

It is expressly provided in Section 8c (15) that the pendency of review proceedings thereunder shall not impede, hinder, or delay the United States in obtain-

ing relief in the enforcement proceedings. If the contention of the appellants were to prevail that all questions pertaining to the order may be considered in the enforcement proceedings, different Federal courts of coordinate jurisdiction would be considering the same questions at perhaps the same time. Such a disorderly procedure would obviously be wasteful and costly. It would also render virtually meaningless the well recognized rule that in the judicial review of administrative action there is to be no trial *de novo* and that the administrative findings, if supported by substantial evidence, are not to be disturbed by the court even though, upon consideration of all the evidence, the court might reach a different conclusion—a rule which has been consistently applied by the District Courts in the review of rulings of the Secretary under Section 8c (15) (B) of the Act.³ The

³ *Queensboro Farm Products, Inc. v. Wickard*, 47 F. Supp. 206 (E. D. N. Y. 1942); *M. H. Renken Dairy Co. v. Wickard*, 45 F. Supp. 332 (E. D. N. Y. 1942); *Sauquoit Valley Farmers Cooperative, Inc. v. Wickard*, 45 F. Supp. 104 (N. D. N. Y. 1942); *Vogt's Dairies, Inc. v. Wickard*, 45 F. Supp. 94 (S. D. N. Y. 1942); *Fairview Creamery, Inc. v. Wickard*, 42 F. Supp. 757 (D. Me. 1942); *Crull v. Wickard*, 40 F. Supp. 606 (W. D. Ky. 1942); *New York State Guernsey Breeders' Co-op., Inc. v. Wallace*, 28 F. Supp. 590 (N. D. N. Y. 1939).

See also *National Broadcasting Co. v. United States*, — U. S. —, 63 S. Ct. 997, 1014 (1943); *Parker v. Motor Boat Sales*, 314 U. S. 244 (1942); *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105 (1942); *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546 (1942); *Gray v. Powell*, 314 U. S. 402, 411–412 (1941); *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 154–155 (1941); *National Labor Relations Board v. Link-Belt Company*, 311 U. S. 584, 596–597 (1941); *South Chicago Co. v. Bassett*, 309 U. S. 251, 257–258

rationale of this rule, as clearly stated by the Supreme Court, is that administrative and judicial bodies are to be regarded as related instrumentalities through whose coordinate action the public purpose of a regulation is to be realized. *United States v. Morgan*, 307 U. S. 183, 190-191 (1939), and *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 15 (1942).

The statutory plan is clear. Section 8a (6) was designed for prompt enforcement, and the evidence in proceedings thereunder should be confined to the single question of violation. This is the only reasonable construction of the Act. Any other would put a premium on disobedience to law by rewarding violators of the order with a short cut to the judicial determination of the issues they seek to raise. The requirement of a first resort to, and exhaustion of, the administrative remedy would be by-passed.

It will sometimes happen, as in the contemporaneous proceeding of the appellants before the Secretary, that questions may arise as to the conduct of the administrative proceeding. It is submitted that all such questions must be resolved in the judicial review of the administrative ruling. See *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 345, (1937); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50 (1938); *Newport News Shipbuilding & D. D. Co. v. Schlauffler*,

(1940); *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 304 (1937); *Chesapeake & Ohio Ry. Co. v. United States*, 296 U. S. 187 (1935); *Virginian Railway Co. v. United States*, 272 U. S. 658, 665 (1926).

303 U. S. 54, 57 (1939); *Lockerty v. Phillips*, — U. S. —, 63 S. Ct. 1019 (1943).

Finally, unless Section 8a (6) is construed restrictively, it must be regarded as surplusage. The general equity jurisdiction of the District Courts includes the power to enjoin violations of law, and Section 8a (6) can have no effect except as a limitation of the scope of proceedings brought to enjoin violations of an order. This was the view of the court below (R. 249).

The decisions rendered under this Act, and other acts with similar provisions, are in accord with the view taken by the District Court in this case. In the recent case of *United States v. Ridgeland Creamery Co.*, 47 F. Supp. 145 (W. D. Wis. 1942), the handler sought to raise as a defense to an action under Section 8a (6) of the Act matters properly triable in a proceeding under Section 8c (15). Judge Patrick T. Stone, in holding that the Court had no jurisdiction under Section 8a (6) to consider such matters, said:

Where, as here, Congress has created a special administrative procedure providing for a review by the Secretary of Agriculture of the United States of actions and determinations of the Market Administrator, and which, as here, meets all requirements of due process, that remedy is exclusive, and this court has no jurisdiction to review the actions and determinations of the market administrator, except in proceedings under Section 8c (15) (B) of the Agricultural Marketing Agreement Act of 1937.

In *Bradley v. Richmond*, 227 U. S. 447 (1912), the defendant was prosecuted and convicted for engaging

in business without having first obtained a license conditioned upon payment of a graduated tax. He was not permitted to raise the defense that the tax against him was erroneous and discriminatory since he had not exhausted the administrative remedy provided by the statute.

Walling v. Cohen, 48 F. Supp. 959 (E. D. Pa 1943), was an action to restrain violation of a wage order promulgated under the Fair Labor Standards Act. (29 U. S. C. 1940 ed. 201 *et seq.*) The defendants attempted to show that the wage order had not been issued in accordance with law and was not valid in its application to their business. The Court refused to consider this defense on the ground that the Act provided an administrative procedure for attacking the validity of wage orders and the propriety of their application to particular operations, with judicial review of the administrative ruling. See also *United States v. Slobodkin*, 48 F. Supp. 913 (D. Mass. 1943); *United States v. C. Thomas Stores*, 49 F. Supp. 111 (D. Minn. 1943); and *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942).

B. Appellants were not deprived of due process by the refusal of the trial court to consider the issues raised by the special defenses

The appellants argue that if they are enjoined from violating the lemon order without first being given an opportunity to present and have an adjudication of the constitutional issues raised by them, they are deprived of due process, since compliance with the order causes them great loss of profit which they will not be able to recoup in the event the order is ulti-

mately held invalid. In support of this argument, reliance is placed upon a number of cases, of which *Porter v. Investors Syndicate*, 286 U. S. 461 (1931), is typical. These cases are said to establish that where the enforcement of administrative action would cause a person affected irreparable damage if the action were finally invalidated, and where the provisions of the applicable statute preclude a supersedeas or stay pending final review, due process is not afforded.

The appellee does not regard the cases cited by this appellant as having application here. In the first place, the provisions of the Act do not preclude the Secretary from granting temporary relief from the operation of the order. It nowhere appears that appellants, or any of them, either in the Section 8c (15) proceedings instituted in their behalf or in any other proceedings, sought such relief. In *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300 (1937), it was held that failure to request a supersedeas or temporary stay, when it is available as an administrative remedy, will preclude a later application to the courts for such relief.

Even where timely application is made for temporary relief, the granting thereof is a matter of discretion, not of right. In *Virginian Railway Co. v. United States*, 272 U. S. 658, 672-673 (1926), the Court said:

A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is de-

pendent upon the circumstances of the particular case.

The circumstances of this case are not such as would justify a stay and the District Court so determined in issuing the injunction herein complained of. It is obvious that the lemon order is unworkable unless all who are subject to it comply. The appellants cannot be exempted even temporarily from the provisions restricting shipments, for that would operate unfairly against all complying handlers and completely disrupt the operation of the order. The appellants constitute a comparatively small number of the total persons affected by the order, the vast majority of whom indicated their desire that it become effective. The order itself is part of a regulatory program enacted by Congress for the welfare of the nation as a whole. As said in *Philips v. Commissioner of Internal Revenue*, 283 U. S. 589, 595, 596-597 (1931):

Property rights must yield provisionally to governmental need. * * * Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. * * * Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.

Courts of equity may very properly go farther to protect the public interest than they are accustomed to go where private interests only are involved. *Virginian Railway Co. v. System Federation etc.*, 300 U.

S. 515, 552 (1937); *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 15 (1942).

In the circumstances, it cannot be said that appellants have been deprived of due process. The Congress has deemed it essential in the public interest that they comply first and litigate afterward, and there is nothing new or unusual in this. *United States v. Slobodkin*, *supra*.

Litigation under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. A. Appendix Sec. 924 (d)) has presented the same question now before the Court. That act provides for an administrative determination of protests by persons subject to any regulation issued under the Act, and for a judicial review by the Emergency Court of Appeals of any ruling denying such protests in whole or in part. Decisions of the Emergency Court of Appeals may be reviewed by the Supreme Court on certiorari. The jurisdiction of the Emergency Court of Appeals and of the Supreme Court is exclusive. All other courts, Federal or State, are deprived of jurisdiction to consider the validity or enjoin the operation of the Act or any price regulation issued under it. These provisions have been held to be within the competence of Congress, and consistent with due process of law. *Lockerty v. Phillips*, — U. S. —, 63 S. Ct. 1019 (1943).

In the *Lockerty* case, the Court affirmed a judgment of the District Court of the United States for the District of New Jersey dismissing an action to restrain criminal prosecution of a merchant subject to the provisions of a price regulation. The Court observed

that “* * * the constitutional validity of the Act, and of orders and regulations under it, may be determined upon the prescribed review in the Emergency Court.” The Court stated also that it had no occasion to consider “whether, or to what extent, appellants may challenge the constitutionality of the Act or the regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.” However, the several District Courts in which the question has arisen have taken the view that the Act validly restricts the issue which may be raised in enforcement proceedings, civil or criminal, to the simple fact of violation of the regulation. *United States v. Slobodkin*, 48 F. Supp. 913 (D. Mass. 1943); *United States v. C. Thomas Stores*, 49 F. Supp. 111 (D. Minn. 1943); *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942).

From appellants’ statement of the question involved, and elsewhere in their brief, the erroneous impression may be gained that the trial court refused to consider whether the order was unconstitutional on its face. In the pretrial proceedings, of which no full record was kept, the District Court indicated that it would not consider any question of constitutionality except the question whether the order was on its face unconstitutional, and, in fact, the trial was conducted on this basis (R. 132, 147). However, appellants made no effort to show that the order was on its face unconstitu-

tional, but sought, through the introduction of evidence, to show the unconstitutionality of the order in its application to them. It is apparent from a colloquy between the Court and counsel for appellants (R. 242) that the latter has misconceived the import of the phrase "unconstitutional on its face," which means that the unconstitutionality of a law or regulation is demonstrable without the introduction of evidence. *Smith v. Cahoon*, 283 U. S. 553, 562-563 (1931); *Lovell v. City of Griffin*, 303 U. S. 444, 451-453 (1938).

II. Even if the trial court erred in refusing to consider or admit evidence to prove the special defenses, the error was not prejudicial

It is well established that if evidence erroneously excluded in the trial court is insufficient, together with the other evidence in the case, to make out the case contended for by the appellants, the error will not be deemed prejudicial, and the decision of the trial court will nevertheless be affirmed. This, of course, is true only where, as in the case at bar, appellants have made a full proffer and the record shows clearly the nature of the evidence excluded. *Gregg v. Moss*, 81 U. S. 564 (1871); *Ivinson v. Hutton*, 119 U. S. 604 (1887); *Chicago and Northwestern Railway Company v. Gray*, 237 U. S. 399 (1915); *Corrigan v. United States*, 82 F. (2d) 106 (C. C. A. (9th) 1936).

The allegations of the special defenses and the evidence proffered in support thereof may be classified roughly as follows: (1) the attempt to establish that from an economic standpoint the lemon order is un-

necessary and inappropriate; (2) the attempt to show that the order discriminates against appellants; and (3) the attempt to show that the order deprives appellants of their property without due process of law.

A. The necessity and appropriateness of the lemon order is not a matter of judicial concern

Insofar as the evidence proffered in support of the special defenses attempts to establish the economic unwisdom of the order, the Court is called upon to decide a dispute which falls within the legislative rather than the judicial pale. As said in *United States v. Morgan*, 313 U. S. 409, 417 (1941):

This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having a delusive certainty. Congress has put the responsibility on the Secretary, and the Constitution does not deny the assignment.

In a similar vein, the Supreme Court, in *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 394 (1940), said:

But appellant claims that this Act is not an appropriate exercise of the Congressional power. It urges * * *; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restriction of the anti-trust laws. Those matters, however, relate

to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain.

Congress has provided generally in the Act for volume proration as a method of attaining orderly marketing of fruits in the effectuation of the declared policy of the Act. It has directed the Secretary to determine the need for such proration in particular instances. Following the direction, the Secretary has issued many other orders, some of which embody proration and are otherwise very similar to the lemon order. Since 1935 oranges and grapefruit produced in California and Arizona have been marketed under such an order. This order has been sustained consistently by the District Courts against almost every conceivable attack, including those attacks pressed here against the lemon order, and has been held valid by this Court. *Edwards v. United States*, 91 F. (2d) 767 (C. C. A. (9th) 1937); *American Fruit Growers v. United States*, 105 F. (2d) 722 (C. C. A. (9th) 1939). See also *Wallace v. Hudson-Duncan & Co.*, 98 F. (2d) 985 (C. C. A. (9th) 1938), involving a walnut order issued under the Act.

B. The lemon order does not discriminate against appellants

The appellants urge that the lemon order is not in accordance with law because it discriminates against them. In support of their claim, appellants offered considerable evidence tending to show their

lack of sufficient storage facilities to operate efficiently under the regulation; their inability, under the regulation, to fill the orders received by them for lemons; and the necessity for them, under the order, because of the types of lemons handled by them, to dispose of a large proportion of their fruit for by-product purposes.

In his decision on this point in the proceedings on the petition filed in behalf of appellants and others under Section 8c (15) (A) of the Act (R. 71), the Secretary of Agriculture said:

“Discrimination” need not be here defined. It is not amiss, however, to note that the essence of “discrimination” is the act of treating one differently from another.²⁹ “Unlawful” or “unjust” discrimination implies not only different treatment, but different treatment without reference to reasonable distinctions or substantial differences between the persons concerned, arbitrary selection from among persons under like or similar conditions.³⁰ The petitioners have been proficient in disclosing their own situation. They have not shown, however, either that their hardships under the order are not matched by the hardships of others subject to the regulation, or that (if it exists) the difference in treatment of which

²⁹ *Hocking Valley Ry. Co. v. United States* (C. C. A. 6th 1914) 210 Fed. 735, 740; *Wimberly v. Georgia So. & F. Ry. Co.* (Ga. 1908) 63 S. E. 29, 31; 27 C. J. S. Discrimination.

³⁰ See *Franchise Motor Freight Ass'n. v. Seavey* (Calif. 1925) 235 Pac. 1000, *Lindenburg v. American Ry. Express Co.* (W. Va. 1921) 106 S. E. 884, 886.

they complain is not founded upon reasonable distinctions and substantial differences validly recognized by the order. In so failing, the petitioners have not built a record upon which any except legally ineffectual findings could be based and have failed, therefore, to carry the burden which is theirs of bringing this proceeding to the stage at which facts can be found. It is, of course, an unavoidable result, if not a stated purpose of regulation, that persons regulated are not free to carry on their activities as they wish and as they conceive to be desirable. That this is true with respect to the petitioners may be freely conceded without, in any manner, reflecting upon the validity of the regulation.

But if the petitioners had here crossed the threshold in their attempt to show discrimination in the operation of the order, there is another aspect of the case which would deny the requested relief. Prorate bases and allotments under the order are derived from a count of lemons "available for current shipment."³¹ The computation of such lemons includes a computation of the quantity of fruit which has been picked and assembled at an established shipping point or, under section 953.4 (d) (5) of the order, if facilities for such assembling are unavailable, of lemons which are not so picked and assembled, but which are nevertheless available for current shipment. Lemons in storage, of course, normally qualify as lemons picked from the trees and assembled at an established shipping point and are, therefore,

³¹ Section 953.4 (d) (2) and (3) of the order.

usually considered in the computation of the quantity of lemons available for current shipment. But if a handler lacks facilities for storing or otherwise assembling lemons—a claim which the petitioners make with respect to themselves—he may apply, under section 953.4 (d) (5), for the alternative computation, the so-called “tree-count” of lemons. It is, of course, one of the specific duties of the Lemon Administrative Committee to make such an alternative computation if assembling facilities are not available. Any handler who is dissatisfied with the computation of his available lemons, either because he believes the computation erroneous or because he feels himself aggrieved by the Committee’s refusal to make a “tree-count”, may, under section 953.4 (d) (10) of the order, appeal to the Secretary for a recomputation. The record indicates that one of the petitioners [not one of the appellants herein] has applied for and received a computation of available lemons under the “tree-count” provision of the order. The record does not indicate that the other petitioners have applied for or received such computations of their available lemons. In any event, it appears that none of the petitioners has appealed, under the applicable section of the order, from a computation of lemons made by the Lemon Administrative Committee. *Agricultural Decisions, Secretary of Agriculture, A. D. 68 (1942).*

The question of discrimination in the sense of classification has been held by the Supreme Court to be one peculiarly for legislative or administrative determina-

tion. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 304 (1937). The same principle should be applied to the classification of tree ripe lemons with all other lemons in the order. A question closely analogous to the question of classification raised herein was presented for decision in *New York State Guernsey Breeders' Cooperative, Inc. v. Wickard* (N. D. N. Y. Jan. 4, 1943, Civil No. 79). There it was asserted that milk produced by Guernsey cows was so different in quality from milk produced by ordinary breeds that it was essentially a different commodity and should be treated as such in the milk order. In its decision, the Court refused to disturb the Secretary's classification, regarding the question as one peculiarly within the province of the Secretary. Unlike the Fourteenth Amendment to the Constitution, the Fifth Amendment contains no equal protection clause and provides no guarantee against discriminatory federal regulation. *Detroit Bank v. United States*, — U. S. —, 63 S. Ct. 297, 301 (1943); *Curriu v. Wallace*, 306 U. S. 1, 13-14 (1939); *Sunshine Coal Company v. Adkins*, 310 U. S. 381, 400, 401 (1940). Even if discriminatory regulation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment, no such case is presented here. See *Detroit Bank v. United States*, *supra*.

C. The lemon order does not take appellant's property without due process of law

In the special defenses and the proffered evidence, appellants emphasized their lack of adequate storage facilities and the costliness of expanding such facilities as they have to meet the requirements of operations

under the order. They also offered evidence to show that the order prevents them from filling all their contracts and orders for the sale of lemons. These facts, if true, indicate the probable extent of the impact of the regulation upon appellants' businesses, but do not support the contention that their constitutional rights are invaded.

In *Mulford v. Smith*, 307 U. S. 38 (1939), the sale of tobacco in excess of the farm quota was subject to a penalty prescribed by the Agricultural Adjustment Act of 1938 (7 U. S. C. 1940 ed. 1281 et seq.). The producers contended that the restriction on the sale of their excess tobacco amounted to the taking of their property without due process of law. The record showed that flue-cured tobacco is practically a perishable commodity in the form in which it is harvested and sold by the farmer; that before it can be stored it must be subjected to a re-drying process; that there were no re-drying plants available to the complaining tobacco growers in Georgia and that the cost of constructing re-drying plants was prohibitive in their case. The Supreme Court, at page 51, said:

The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstances that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

Similarly, here, the fact that the appellants have not provided facilities for storage of lemons "is not of legal significance."

The contention that the curtailment of appellants' rights to contract with respect to their property violates the due process clause of the Fifth Amendment, is clearly without merit. The same contention has been made in cases involving other orders issued under the Act and has been consistently rejected by the courts. This precise point was made in *Whittenburg v. United States*, 100 F. (2d) 520 (C. C. A. (5th) 1939). There the order prohibited the shipment of grapefruit of poor quality, or of small sizes even though of good quality. It was shown, as here, that the handlers had large orders for these small sizes; that they were independent packers not having the facilities of a large cooperative association for disposing of the small sizes advantageously; that their method of doing business was to buy all of the fruit in a particular orchard and, necessarily, they had to take and pay for all of the small fruit as well as the large fruit.

On this feature of the case the court said, at page 523:

The appellants had some small and inferior grapefruits for which they had a sale but were forbidden to ship them in interstate commerce during the time covered by the weekly orders. They bought them while the law was in force. The Secretary's orders did not confiscate them. The owners could sell them for use in the State if the State law permits, extract the juice, or use them otherwise than to glut the market by shipping them interstate or to Canada. Their liberty to make a desired use of them was for the public good suspended for

a time, but their property was not taken. It is said they dare not buy grapefruit in the face of the law and so their liberty of contract, which is a form of property, is destroyed. But in fact they may buy all they wish, subject to the public right not to have the market upset with them. Such collisions between private right and exertions of police power for the public good result generally in the prevalence of the public good. Liberty and property have always been qualified by the ancient maxim: *Sic Utere tuo ut alienum non laedas*. This Act requires notice to and hearing of those to be affected before the Secretary makes his orders, and for a judicial review thereof. Hearing was afforded in this case. Liberty and property have not been taken without due process of law.

In *Wallace v. Hudson-Duncan & Co.*, 98 F. (2d) 985 (C. C. A. (9th) 1938), a walnut order issued under the Act, and particularly those provisions requiring the delivery to the agency administering the order of a specified percentage of the quantity of walnuts handled in interstate commerce, or the equivalent cash value, was challenged as taking property without due process of law. This Court rejected the contention, stating at page 989:

This is not a case of the "taking" of property within the meaning of the last clause of the Fifth Amendment. There is no direct appropriation of property from the Company. *Omnia Commercial Co. v. U. S.*, 261 U. S. 502, 508 et seq., 43 S. Ct. 437 et seq., 67 L. Ed. 773, and cases cited. The Order contains no absolute requirement of the delivery of walnuts to

the Control Board. The requirement is a conditional one. If the Company chooses not to comply with the interstate requirements of the Order, it may nevertheless retain all its walnuts intrastate and dispose of them to intrastate buyers.

The lemon order does not contain any requirements for the delivery of lemons or the equivalent value to any governmental agency. The form of regulation applied here—volume proration—is far milder in its application. In fact, it was argued in the *Hudson-Duncan* case that volume proration or a quota system would be wholly unobjectionable and would raise no question under the due process clause, and therefore, should have been adopted by the Secretary in the walnut order.

In substance, the appellants' main complaint is that they are being deprived by the lemon order of a comparatively favorable position in the lemon industry, for they have always been able to dispose of all their merchantable lemons in fresh fruit channels, when most other handlers often could not. The order distributes the current demand for lemons among all handlers in proportion to the supply each may have currently available. In other words, a principle of equalization is at work. Judge Bryant's words in *New York State Guernsey Breeders' Cooperative, Inc. v. Wickard* (N. D. N. Y. Jan. 4, 1943, Civil No. 79) aptly answer appellants' complaint on this score:

Concededly, plaintiff was and is a handler of milk as defined in Order 27. Concededly, its producers have been injured by the Order. The

same can be said of all other producers who, at the time of the making of the Order, had a Class I Market. The purpose was to stabilize the industry through division of the benefits of this particular market between the possessors and nonpossessors. The principle of equalization embodied in this very order was fully considered and held constitutional by the Supreme Court in *U. S. v. Rock Royal Cooperative, Inc.*, 307 U. S. 533. In fact practically every feature of the order was therein considered. The injury caused by equalization alone is not a basis of attack.

III. Conclusion

It is respectfully submitted that the judgments of the District Court should be affirmed.

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No. 10266.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LA VERNE CO-OPERATIVE CITRUS ASSOCIATION, a corpo-
ration, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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Introductory Statement.

The question here before the Court is a simple one. Succinctly stated, it is:

Where a person is sued by the Government to restrain him from violating what purports to be the law, or, as here, what purports to be an order of an administrative agency, is there a *conclusive* presumption that the law or order is valid? In other words, can one be compelled to obey a so-called law or order which is *not in fact* a law or order and be relegated to so-called administrative remedies which may or may not ultimately afford him a declaration of his rights and the relief to which he is entitled?

If the Government is correct in its views, then no matter how far beyond its granted powers any administrative agency may go, those who are oriented by its action and

who meanwhile may lose their all thereby perchance may finally achieve a Phyrrie victory—an intellectual accomplishment no doubt—but instead of bread find that they have only a stone.

I.

Answer to Appellee's Point I.

In the instant case we are dealing with Order No. 53 of the Secretary of Agriculture which controls and limits the shipments of lemons in interstate commerce.

Appellants having filed a petition with the Secretary of Agriculture under Section 8c (15) (A) of the Agricultural Marketing Act, seeking to be exempted from the operation of Order No. 53, and following a ruling by the Secretary denying and dismissing their petition, having filed in the United States District Court for the Southern District of California a bill in equity under and in accordance with the provisions of Section 8c (15) (B) of the Act, have exhausted their administrative remedies in so far as they have been able to do so. The cases on appeal were not of their seeking. They did not come into court asking for relief by way of injunction or otherwise against the enforcement of the order, but were brought in unwillingly as defendants. It follows that cases holding that one affected by, and complaining of, an administrative order, must first exhaust his administrative remedies before seeking relief in the courts, have no application. Appellants have not contended, and do not contend, that in the instant cases "all questions pertaining to the order" may be considered. (See Appellee's Br. p. 13.) We concede for the purposes of this case, that in the enforcement cases the Court starts with the order issued after the Promulgation Hearing, to wit, Order No. 53, and that all questions rela-

tive to procedural matters, including due process, in so far as due process has to do with procedure before the Secretary of Agriculture, must be determined in the review proceedings under Sections 8c (15) (A) and (B) of the Act, and we have never made any assertion to the contrary. Hence, the cases cited in footnote 3, on pages 13 and 14 of Appellee's Brief, are not in point.

There is a marked difference between constitutional questions involving procedural matters and those which go to the validity of the order either on its face or in its application. The distinction is recognized in the following quotation from *United States v. Slobdkin*, 48 Fed. Supp. 913, cited on page 16 of Appellee's Brief. This was a proceeding by the United States against Slobdkin (and a companion case against Rottenberg Co. Inc., *et al.*) for alleged violations of the Emergency Price Control Act of 1942, Sec. 1 *et seq.*, 50 U. S. C. A. Appendix, Sec. 901 *et seq.* We quote from page 916 of 48 Federal Supplement:

"In approaching this question it is important to distinguish two different types of asserted invalidity. A regulation might, in form or in substance, be invalid on its face; or, though fair on its face, it might be invalid because of the circumstances of its adoption or application. This distinction is familiar in the area of administrative law. *Smith v. Cahoon*, 283 U. S. 553, 562, 51 S. Ct. 582, 75 L. Ed. 1264; *Lovell v. Griffin*, 303 U. S. 444, 452, 453, 58 S. Ct. 666, 82 L. Ed. 949. Illustrative of the former type of invalidity would be a regulation establishing different prices for persons of white than for persons of black color; or a regulation which, though it recited compliance with the Act, in fact governed a subject, such as an income tax, obviously foreign to the Act.

Illustrative of the latter type of invalidity would be a regulation fair on its face but adopted without whatever procedural formalities may be requisite; or a regulation establishing classifications which in view of the surrounding circumstances are arbitrary and capricious.”

Appellee has not cited any decision holding that where, as here, the Government seeks to enforce what purports to be an order of the Department of Agriculture, or other governmental agency, and where, as here, the validity of such purported order is attacked, not only on the ground that it is discriminatory, but also “unjust, unreasonable and arbitrary” and violative of the Fifth Amendment (in that it deprives defendant of its property without due process of law, in the sense that the order in and of itself, both on its face and in its application, establishes classifications “which in view of the surrounding circumstances are arbitrary and capricious”), that such defendant is not entitled to introduce evidence in support of his defense, to have the Court pass upon the constitutionality of the order, or to findings of fact, in the absence of express statutory provisions depriving a court hearing such case of its powers in such respect.

That both in enforcement proceedings by way of injunction and in criminal proceedings to enforce penalties for violation, the District Courts have jurisdiction to pass on constitutional questions (other than those affecting its validity because of the circumstance of its adoption), unless prohibited from doing so by the statutory limitations, is argued with supporting cases in Appellants’ Opening Brief. The Congress has recognized this general rule in

its enactment of the Emergency Price Control Act of 1942, Chapter 26, 56 Statutes 23, 31, U. S. C. A., Title 50, Appendix, Section 924(d). This act expressly provides that no court, federal, state, or territorial (other than the Emergency Court of Appeals created by the Act, and the Supreme Court of the United States) shall have jurisdiction or power to consider the validity of any regulation, order or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of the Act authorizing the issuance of regulations or orders, or making effective any price schedules or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision. We quote Section 924(d) in the Appendix to Title 50 U. S. C. A., in the appendix hereto.

The cases of *United States v. C. Thomas Stores*, 49 Fed. Supp. 111, and *Henderson v. Kimmell*, 47 Fed. Supp. 635, also cited on page 16 of Appellee's Brief, have to do with the same provisions of the Emergency Price Control Act of 1942. This Act was enacted by the Congress in the exercise of its war powers. The Agricultural Marketing Act was not. The Emergency Price Control Act of 1942 contains express prohibition against any court other than the Emergency Court of Appeals and the Supreme Court of the United States passing upon the validity of an order or regulation issued pursuant to that Act. The Agricultural Marketing Act contains no such prohibition. If, in the absence of an express prohibition against a District Court, in an enforcement proceeding, passing upon the constitutionality of an order of an administrative agency, the Court does not have such power, the insertion of a specific prohibition in the Emergency Price Control Act would have been unnecessary.

Appellee insists that appellants should have requested a *supersedeas* or temporary stay in the Section 8c (15) proceedings (Appellee's Br. p. 17) and that the failure to do so is fatal to the right to raise constitutional questions in the instant cases. It relies in this connection on the case of *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 82 L. Ed. 276. The point is discussed in the opinion in that case, on page 281 of 82 L. Ed., 302 U. S., p. 309, where the Court says:

"We have no occasion to consider the merits of these objections. It suffices to say that the statute itself provides an adequate administrative remedy which appellant has not sought. By Sections 64 and 65 of the Act the commission was authorized on its own motion or on application of appellant to order a hearing to ascertain whether the present order was 'improper, unreasonable or contrary to law.' Section 67 authorizes the commission at any time, upon proper notice and hearing, to 'rescind, alter or amend any . . . order or decision made by it.' We see no reason, and appellant suggests none, for rejecting the trial court's ruling that the commission, if asked, could have modified its order, or for concluding that the commission was without authority to suspend or postpone the date of the effective operation of the order so as to avoid the running of penalties, pending application for its modification. *Porter v. Investors Syndicate*, 286 U. S. 461, 470, 76 L. ed. 1226, 1231, 52 S. Ct. 617, 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132."

It is interesting to note that the only authority cited for the quoted language is *Porter v. Investors Syndicate*, 286 U.S. 461, 470-71, 76 L. Ed. 1226, 1232, 53 S. Ct. 132,

also cited on page 30 of Appellants' Opening Brief, and sought to be distinguished on page 17 of Appellee's Brief.

We quote from the opinion in the *Porter* case (286 U. S., at pp. 470-471, 76 L. Ed., p. 1232):

"Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 454, 60 L. ed. 1084, 1098, 36 S. C. 637. But where either the plain provisions of the statute (*Pacific Teleph. & Teleg. Co. v. Kuykendall*, 265 U. S. 196, 203, 204, 68 L. ed. 975, 980, 981, 44 S. C. 553) or the decisions of the state court interpreting the act (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 67 L. ed. 659, 43 S. C. 353) precludes a *supersedeas* or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

We find no provision in the Agricultural Marketing Act which authorizes an application to the Secretary of Agriculture for a supersedeas or temporary stay. But if the Secretary may grant a stay, it would seem that his powers in that regard terminated with his ruling on the petition under Section 8c (15) (A). In the present cases a petition was filed with the Secretary praying for relief in the language of Section 8c (15) (A), and until the Secretary ruled on that petition there was, and could be, no reason for petitioners asking for a supersedeas. By the provisions of Section 8c (15) (B) the petitioners were required to file their bill in equity for a review in

the United States District Court within twenty days following the Secretary's ruling dismissing their petition. We know of no procedure whereby an application could be made to the Secretary of Agriculture for a stay after he had ordered the petition dismissed, and if such an application had been made, the time for filing the bill in equity for review in the District Court would not have been enlarged. Hence, the petitioners might have been in the position of asking the Secretary to make an order granting a supersedeas with respect to a petition which he had already ordered dismissed, while at the same time seeking a review of that order in the District Court.

Neither do we find any provision in the Agricultural Marketing Act which requires an application for a supersedeas in the District Court in connection with the review proceedings as a prerequisite to challenging in enforcement proceedings the constitutionality of an order issued by the Secretary under that Act. We find nothing in *Natural Gas Pipeline Co. v. Slattery, supra*, or in any other case, which requires a person to ask for a supersedeas or temporary stay as a necessary prerequisite to challenging the validity of an order of the Secretary of Agriculture as a defense in enforcement proceedings, where, as here, the attack on the order is not based upon "the circumstances of its adoption."

Appellee asserts that "The circumstances of this case are not such as would justify a stay and the District Court so determined in issuing the injunction here complained of." (Appellee's Br. p. 18.) This is equivalent to saying that the so-called administrative remedy of a supersedeas or temporary stay was not available to appellants. The gist of the argument is that appellants must obey an unconstitutional order (which if unconstitutional is not an order at all), unless they have asked, as an

administrative remedy, a supersedeas or temporary stay, which administrative remedy was not available to them. This doesn't make sense.

The District Court cases cited in footnote 3 on page 13 of Appellee's Brief, stem from *New York State Guernsey Breeders Co-Op. Inc. v. Wallace*, 28 Fed. Supp. 590 (N. D. 1939). That case holds (p. 592) that in review proceedings under Section 8c (15) (B) of the Agricultural Marketing Agreement Act, the District Court is not to conduct a trial *de novo*, and that the question whether a ruling of the Secretary is "in accordance with law" is to be determined on the record before him "*save as there may be an exception of constitutional right.*" (Emphasis added.) The same exception applies with respect to enforcement proceedings.

Appellee insists (Appellee's Br. p. 14) that Section 8c (6) was designed for prompt enforcement and that the evidence and proceedings thereunder should be confined to the single question of violation. It says that this is the only reasonable construction of the Act and that any other "would put a premium on disobedience to law by rewarding violators of the order with a short cut to judicial determination of the issues they seek to raise." This begs the question, because if the order in question is unconstitutional, person who disobeys it is not disobeying any *law*, and hence, no premium is being put on disobedience to any *law* and no violator of an order is rewarded or furnished any short cut, except a short cut furnished by the Government in seeking to enforce what purports to be, but is not in fact, an order. The vice of the Government's argument is that it assumes throughout that the order is constitutional and must be held to be constitutional.

II.

Answer to Appellee's Point II.

The Government would have it that we are solely, or at least primarily, concerned with "discrimination" against appellants. This is not so. Discrimination is *only one of several grounds* upon which the order is attacked [see paragraphs XII and XIII of the affirmative answer in the *La Verne* case, R. 49-51]. Appellee admits that discriminatory regulations may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment (*Detroit Bank v. United States*, 63 S. Ct. 297, 301; 87 L. Ed. Adv. Op. No. 6, pp. 266, 271), but asserts that no such case is presented here (Appellee's Br. p. 27). It also asserts that Order No. 53 does not take plaintiffs' property without due process of law (Appellee's Br. p. 27 *et seq.*). In short, it undertakes to argue the merits of the cases in so far as special defenses are concerned, although the District Court expressly declined to pass on them.

In the absence of findings by the trial court, this Court cannot and will not examine the evidence and make its own findings thereon. It is for this reason that we said in Appellants' Opening Brief, at page 38:

"No good purpose would be served by attempting an argument on the merits in these cases at this time, and we shall make none. But we direct attention to the fact that considerable evidence relating to the constitutional questions was introduced in the hearings before the Secretary, which was supplemented

by additional evidence offered and refused admission by the District Court in these cases.”

An examination of the evidence by this Court would require not only its examination of the printed Transcript and Record, but also the examination *in extenso* of the record before the Secretary, which was offered in evidence by the Government and denied admission [R. 151-2].

Again, on page 18 of Appellee’s Brief, it is said:

“The circumstances of this case are not such as would justify a stay and the District Court so determined in issuing the injunction herein complained of.”

This is to say that the District Court passed upon the merits of the case; that it went beyond a mere holding that the order was made and was violated, and held that “the circumstances of the case” did not justify a stay, *i.e.*, that the evidence did not establish the invalidity of Order No. 53. Certainly if the District Court so held, appellants were entitled to specific findings of fact from which the legal conclusion follows, and this Court is entitled to know upon what facts the trial court based its holding. The law in this respect is well stated in the recent case of *Securities and Exchange Commission v. Chenery Corporation*, Vol. 87, L. Ed. Adv. Op. (Feb. 1, 1943) No. 8, 411, at page 416:

“In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court,

it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran*, 302 U. S. 238, 245, 82 L. ed. 224, 229, 58 S. Ct. 154. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."

See, also:

Hazeltine Corporation v. Crosley Corporation
(C. C. A. 6—1942), 130 Fed. (2d) 344, 348-9;

Kendrick Coal Dock Co. v. Commissioner of Internal Revenue (C. C. A. 8), 29 Fed. (2d) 559, 564;

Hunter v. Scruggs Drug Store (C. C. A.—1940), 113 Fed. (2d) 971, 974;

Matton Oil Transfer Corp. v. Dynamic (C. C. A. 2—1941), 123 Fed. (2d) 999, and

Perry v. Baumann (C. C. A. 9—1941), 122 Fed. (2d) 409.

III.

The Evidence Is Insufficient to Sustain Finding of Fact Number XIII.

This point is discussed under heading II, on page 39 of Appellants' Opening Brief. Appellee does not deny that there is a complete absence of evidence to sustain the finding in the particulars referred to in our opening brief, but says that the allegation and finding that non-compliance was injurious to interstate commerce is surplusage and was so regarded by the court below (Appellee's Br. p. 8). This may have been the opinion of the trial court, but it nevertheless made the finding, and we are not content to rest on what the judge said during the course of the trial, and, hence, before the findings were prepared or signed.

Appellee cites *American Fruit Growers v. United States*, 105 Fed. (2d) 722, 725, as being in accord with its views. The opinion in that case does not support the assertion. The Government sued American Fruit Growers to restrain the violation of an order made by the Secretary of Agriculture, known as Prorate Order No. 111, fixing prorate bases for oranges for the week beginning August 14, 1938. Order No. 111 was an administrative order made pursuant to basic Order No. 2 of the Secretary of Agriculture. The validity of Order No. 2 was not attacked, but the validity of Order No. 111 was assailed by defendant on the ground that it was in conflict with the provisions of the Agricultural Marketing Act and the basic order issued pursuant thereto. The bill alleged "that

the effect of appellant's violation of the order 'has been to impair the effectiveness of the program inaugurated by the order regulating the handling of oranges * * * to disrupt and obstruct interstate commerce * * * to render partially ineffective the lawful regulation of such commerce, as provided in the act and order * * *."

Defendant alleged as separate defenses "that the bill failed to state facts sufficient to constitute a cause of suit, and that the prorate order was void because in conflict with the provisions of the Act and Order No. 2. The District Court granted an injunction *pendente lite* and defendant appealed. There does not appear to have been any question raised as to the sufficiency of the evidence to sustain findings of fact, nor of the necessity of findings with respect to the quoted allegations of the bill. It is true that this Court in its opinion said: "By 7 U. S. C. A. Section 608a (6) Congress authorized an injunction upon a showing of violation alone" (p. 725), but this was said with reference to the necessity of pleading facts showing irreparable injury, or that the United States had no adequate remedy at law and was limited to the violation of "a valid order." Of course, if the findings that the acts of appellants were or would be injurious to interstate commerce and to growers, handlers and consumers of lemons, or did or would threaten the stability of interstate or foreign commerce in lemons, or did or would tend to thwart the national policy of improving the marketing conditions in the handling of lemons in interstate commerce, or any of such findings, are surplusage, then it

would seem that the insufficiency of the evidence to sustain them would not be grounds for reversal, but by the same token these findings should not be binding upon appellants, or constitute *res judicata* in the review proceedings which are still pending, or in any other litigation.

Appellants are entitled to a definite holding that the findings in question are surplusage and not binding on them, on the one hand, or, in the alternative, to a reversal of the case for insufficiency of the evidence to sustain the findings.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorneys for Appellants.

APPENDIX.

EMERGENCY PRICE CONTROL ACT of 1942, Title 50 U. S. C. A., Appendix, Section 924(d):

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 (section 902 of this Appendix), of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

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No. 10266

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

LA VERNE COOPERATIVE CITRUS ASSOCIATION ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

FILED

NOV 27 1943

PAUL P. O'BRIEN,
CLERK

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INTRODUCTION

The appellee submits this supplemental brief in compliance with the direction of the Court at the oral argument in this case, which took place on October 15, 1943. The brief will discuss the questions treated in the appellants' supplemental brief.

I. The separate defense in the answer in each of the cases on appeal does not state a valid defense

A. Generally

Each of the appellants interposes in its answer substantially the same defense to the complaints. For the purpose of this supplemental brief, the defense stated in the La Verne answer will be taken as typical

of all, except for the additional defense (R. 84) set forth in a certain portion of paragraph one of the answers of the appellants other than La Verne and Glendora. This method of treatment is adopted also by the appellants in their supplemental brief. In the appendix thereto are set forth the portions of the answers which appellants say contain the gist of their separate defenses (Appellants' Supplemental Brief, p. 3). Consideration of whether the separate defenses are good in law may, therefore, be confined to these averments.

B. Paragraphs one, three, and four of the separate defense

Paragraphs one, three, and four of the separate defense allege general matters concerning the lemon industry as a whole. Differences in the storage capacity of dark green, light green, silver and tree-ripe lemons are pointed out, and it is alleged that these differences may require different methods of handling, shipping, and marketing each type of lemon. It is stated that the coastal areas of California produce higher proportions of green lemons than do the interior areas where peak picks are earlier, and that there are marked differences in the proportions of green to tree-ripe lemons in different groves in the same district, the age and physical condition of the trees and soil conditions being controlling factors. Likewise, the proportion may vary in the same grove from year to year with variations in climatic conditions. The method of handling lemons commercially is explained, and it is alleged that a handler must pack at least two and usually

three carloads at a time in order to operate economically and compete successfully.

These allegations taken by themselves, and accepted as true, certainly do not constitute a valid defense. They do not relate the position of the individual appellants to the general conditions pictured, nor do they show that appellants are affected by the lemon order differently from any other handler coming within its scope.

C. Paragraph ten of the separate defense

Paragraph ten of the separate defense complains that the lemon order prevents the appellants from filling the orders of their regular customers and from selling large quantities of lemons at profitable prices. It is also stated that the orders which the appellants were unable to fill were filled by the California Fruit Growers Exchange. This is not a valid objection to the lemon order. The appellants concede that the frustration of their contracts does not in itself make the order invalid (Appellants' Supplemental Brief, p. 3). The restriction of shipments under prescribed conditions is the primary purpose of the act and the lemon order, and the constitutional power of Congress to impose such restrictions is not challenged by the appellants. There is no allegation in this paragraph of the separate defense that the restriction on shipments has been applied discriminatorily against the appellants.

D. Paragraph eleven of the separate defense

Paragraph eleven states that in order to operate competitively under the lemon order appellants are re-

quired to expend large sums of money to expand their storage facilities. It is also averred that the order puts appellants to great expense in the rehandling of lemons. However, appellants concede that neither of these matters constitutes a valid defense (Appellants' Supplemental Brief, p. 3).

E. Paragraph Twelve of the Separate Defense

Paragraph twelve is characterized by the appellants as the heart of the separate defense (Appellants' Supplemental Brief, p. 3). It first avers that the administration of the lemon order has been unreasonable, arbitrary, unjust and discriminatory as against appellants in that *total* weekly shipments have been fixed in unreasonably low amounts and in amounts much less than the market would absorb at profitable prices. This, if true, could hardly be a discrimination against appellants for it would be equally restrictive as to all handlers. The determination by the Secretary of Agriculture of the amount of the total advisable weekly shipments of lemons is based upon an appraisal of various economic factors. It is not contended by the appellants that such determinations are subject to judicial review. No effort was made by them to proffer evidence in support of the allegation, nor are any facts alleged which might form a foundation for it. Since this allegation is not discussed in appellants' supplemental brief, it may be regarded as out of the case.

It is further alleged in said paragraph twelve that, because of the unreasonably low and discriminatory allotments allowed appellants, they have been com-

pelled to dispose of a large quantity of lemons to by-products and other nonfresh fruit channels, and they will be unable to market quantities of tree-ripe lemons in fresh fruit form, with loss of the benefit of such lemons in the computation of allotments except during their brief storage life, in consequence of which they are suffering great loss. This is the first reference in the separate defense to discrimination *against appellants* in the making of *individual* allotments. The effects described as resulting therefrom are the same which would result from the making of any allotments, and no support for appellants' defense can be gained from their mere recital. There is simply the bare statement of discrimination. No facts are alleged to show that appellants are treated or affected differently from other handlers. It appeared later from the proffered evidence that appellants intended to establish that they are so differently situated from other handlers that *similar* treatment amounted to discrimination against them. As shown hereinafter, they were unsuccessful in this effort. In the separate defenses, however, no facts are alleged which would serve as a foundation for that or any other claim of discrimination.

F. Paragraph thirteen of the separate defense

Paragraph thirteen suffers from the same infirmity as paragraph twelve. The claim of discrimination is reiterated, but not a single allegation of fact is made.

G. The separate defense does not allege an unlawful discrimination

Assuming that the fact of discrimination has been adequately pleaded by the appellants, it does not fol-

low that it is such a discrimination as would invalidate the lemon order. The discrimination is said to consist in placing green and tree-ripe lemons in one classification for the purpose of proration. In the original brief of the appellee, it was pointed out that this is a matter peculiarly for legislative or administrative determination, and, further, that the Constitution of the United States provides no guarantee against discriminatory federal regulation (Appellee's Brief, pp. 26-27). Conceding that discriminatory federal regulation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment, it can hardly be said that the separate defenses make out such a case. The presumption of the existence of a state of facts justifying the lemon order is far too strong to be overturned by such suggestions as are made here. See *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 567-568 (1939). Finally, with respect to the contention, first made in the appellants' supplemental brief, that the lemon order fails to conform to the requirements of Sections 8c (6) (A), (B), and (C) of the Act, no hint of this appears in any of the separate defenses.

II. The excluded evidence does not support appellants' claim of discrimination

A. Only the appellant, Chula Vista, has attempted to show discrimination

The appellants have selected the evidence proffered with respect to the appellant, Chula Vista Mutual Lemon Association, as an example for the purpose of discussing this aspect of the appeal. It should be made clear, however, that the situation of Chula Vista is not common to that of the other appellants. It appears

that a large percentage of the lemons handled by Chula Vista are small size tree-ripe fruit (R. 183). In this respect, Chula Vista may be distinguished from the other appellants as to whom there is no evidence that they handle lemons in a different manner from other handlers subject to the lemon order (R. 194-214, 214-226, 226-239, 239-240, 240-241). On this ground alone, the separate defense as to all the appellants but Chula Vista must fail.

B. The place of the appellants in the marketing of lemons prior to compulsory proration

Considerable evidence was proffered showing that since the beginning of proration under the lemon order the appellants have been unable to dispose of as large a proportion of their fruit in fresh fruit channels as they did in the years prior to the order, when they were able to sell substantially all of their marketable fruit (R. 163). This is a natural effect of proration, which implies a sharing of the available market when the supply so far exceeds demand as to threaten cut-throat competition and severely depressed prices. However, there is an explanation of the appellants' previously favorable marketing position which has a direct bearing on the issues involved here. It is common knowledge that since 1924 the California Fruit Growers Exchange, which handles approximately ninety percent of the total lemons produced in this country, has voluntarily adopted a plan of proration.¹ The purpose of that plan was to keep

¹ *The Citrus Industry and the California Fruit Growers Exchange System*, Circular C-121 (June 1940), Farm Credit Admin-

from the fresh fruit market in seasons of surplus production a proportion of the lemons handled by each of its member associations in order to maintain prices and assure a better return to growers. By virtue of this voluntary proration, outside organizations, such as the Mutual Orange Distributors, of which the appellants are members, were able to dispose of substantially all their marketable fruit in fresh fruit channels at comparatively favorable prices. For instance, the proffered testimony shows that while Mutual Orange Distributors made about 95 percent of its interstate sales on private orders rather than through the auction markets, the prices obtained for its fruit were determined by the auction market prices (R. 157-8), which were considerably influenced by the voluntary proration of the California Fruit Growers Exchange. In this manner, Mutual Orange Distributors and its member associations reaped the benefits of proration without bearing any of its burdens. It may be inferred that the steady annual increase in the Mutual Orange Distributors' percentage of total lemon shipments (R. 159-160, 288) was in large part due to the artificial advantage thus accruing to its members. Insofar as the lemon order deprives them of that advantage and distributes the burden of proration among all lemon handlers, appellants are not in a position to complain.

istration, United States Department of Agriculture, 72; *Economic and Legal Aspects of Compulsory Proration in Agricultural Marketing*, Bulletin 565, December 1933, University of California, 19.

C. Storage of lemons under the lemon order

The evidence proffered to show that compulsory proration has required appellants to keep many lemons in storage beyond the point where they were in good condition for shipment as fresh fruit (R. 166-7) does not establish any discrimination. The lemon order does not guarantee that all lemons will be shipped in fresh fruit channels. It simply sets up machinery for adjusting market supply to anticipated demand. The 1940-41 crop year² witnessed the greatest lemon crop in history.³ Large quantities of lemons were permanently withheld from the fresh fruit market because of the inordinately large supply, although carlot shipments were the greatest in history.⁴ What the appellants complain of in this respect was also true of all other handlers affected. That can hardly be discrimination.

Nothing in the lemon order requires appellants to ship as fresh fruit, lemons which are not in good condition for marketing. The implication to that effect appearing on page sixteen of the appellants' supplemental brief is misleading. Appellants' did not offer to show that they were unable to fill all their

² The 1940-41 crop year began November 1, 1940, and ended October 31, 1941. This is the year in which the lemon order went into effect and to which the proffers of proof relate.

³ 17,000,000 boxes as against 11,983,000 boxes for the previous year which had been the highest record crop (R. 259, 288; Agricultural Statistics, 1942, United States Department of Agriculture, 236).

⁴ More than 24,000 cars as opposed to less than 20,000 for the previous year (R. 288; Agricultural Statistics, 1942, United States Department of Agriculture, 237).

allotments with fruit in good marketable condition; in fact they sought to prove that they shipped only the best grades of lemons (R. 163, 186).⁵

D. Appellants' claim of monetary loss in inability to fill orders for lemons

It is claimed that appellants could have marketed an additional 250 cars of lemons at an additional return to their growers of \$270,000 had it not been for the restrictions on shipments imposed under the lemon order (R. 174-5). These figures are based upon an assumed market in which all of appellants' competitors are subject to proration but appellants themselves free to market as they please. Of course, such a market would permit the appellants to dispose of substantially all their lemons at a large profit even in 1941, a year of tremendous overproduction, but that certainly is no defense to the complaint. It is interesting to note that appellants are not attacking the whole proration plan so that if they should be successful all handlers would be free of it; they simply ask a special dispensation for themselves. What appellants' return to their growers would have been in the year 1941 had there been no proration at all is a matter of speculation, but, considering the great overproduction in that year, it is not out of place to suggest that it would have been very small indeed.

The proffers of evidence more than once contained the statement that when, by reason of having filled

⁵ Allotments under the lemon order are made only with respect to interstate fresh fruit shipments. All handlers are completely free to sell in the intrastate fresh fruit market and in the by-products market. Marketable lemons which cannot be sold as fresh fruit are usually diverted to by-products (R. 231).

their allotments, appellants could no longer completely supply their customers, the customers would turn to the California Fruit Growers Exchange for their additional needs (R. 175, 185-6, 210), thereby implying that the Exchange was not similarly restricted. No evidence was proffered in support of such implication, however, and its falsity is so obvious that it need not be elaborated upon.

The proffers of evidence show appellants' percentage of the total industry-wide fresh fruit lemon shipments in the crop year 1940-41 both before and during the period of proration under the lemon order (R. 289). It is true that after the beginning of proration, appellants' percentage of total lemon shipments showed a drop, but that does not tell the whole story. The same evidence reveals that for several months prior to the beginning of compulsory proration appellants' percentage of total shipments was abnormally high. It may be inferred that appellants were making heavy shipments in anticipation of the restrictions of the order. Such heavy shipments, however, would deplete the quantity of lemons appellants had in store available for shipment, and, since allotments under the order are based on the quantities of lemons each handler has in store,⁶ the appellants' allotments immediately after the beginning of proration would be comparatively small. This is borne out by the fact that appellants' percentage of total

⁶ Sec. 953.4 (d) (3), (5) of the order also provides for alternative methods of computing a handler's lemons available for shipment. It is under this section that the "tree count" method was established.

lemon shipments shows a steady rise after proration began if the figure for June is discounted, as indeed it must be, because of heavy overshipments in that month (R. 265, 289).

E. Appellants' claim of discrimination with respect to small size tree-ripe lemons

In their supplemental brief, the appellants deal at length with the discrimination alleged to result from the fact that the lemon order treats small size tree-ripe lemons in the same manner as it treats large size green ones (Appellants' Supplemental Brief 19-22). It must be kept in mind that no person handles lemons of any one color or size exclusively. All orchards produce lemons of every size and color in varying proportions in different years, although many orchards consistently turn out a higher than average proportion of lemons of a certain color and size (R. 118-122). Of all the appellants, only Chula Vista handles a comparatively large percentage of small size tree-ripe lemons (R. 183-4).

The appellants in their supplemental brief at pages 13-14 refer to the stipulated evidence (R. 121) that orchards in the interior areas produce a higher proportion of tree-ripe lemons than orchards in the coastal areas of California. It is significant that appellants are engaged in the handling of lemons grown in Los Angeles, Orange, San Diego, and Ventura Counties (R. 64-65, 86, 88, 89, 91), all of which are coastal counties and considered as largely coastal areas in lemon production. The total number of handlers, including appellants, handling lemons in each of these

counties is approximately as follows: Los Angeles County, 48; Orange County, 33; San Diego County, 11; and Ventura County, 18.⁷

Allotments under the order are based upon the ratio of the quantity of lemons each handler has available for shipment to the total quantity of lemons available for shipment by all handlers. The greater the number of lemons a handler has in store in comparison to other handlers, the greater will be his proportionate share of the total weekly quantity to be shipped. The allotments are fixed each week for each handler, but the prorated base (the proportion between each handler's lemons in store and the total number of lemons in store) is fixed every two weeks.

Tree-ripe lemons have a storage life of from ten days to six weeks whereas green lemons may keep in storage as long as four to six months (R. 121). The allotments of a handler with a disproportionately large number of tree-ripe lemons may not be large enough to enable him to ship all of them during their comparatively short storage life. This is also true of green lemons, but a longer period of time will elapse before such lemons will deteriorate. Any resulting disadvantage with respect to tree-ripe lemons is merely a reflection of what they would suffer in a free market. Such lemons must be marketed within a short period of time regardless of market conditions. As appellants themselves say, they must be moved even though the market may be

⁷ *Farmers' Business Associations*, Farm Credit Administration, United States Department of Agriculture, April 1943, 5-19.

already oversupplied and a better price could be obtained for them if held longer (R. 165-166).

The disadvantage of tree-ripe lemons in a free market is readily apparent. The peak picks of tree-ripe lemons which occur early in the season must be moved to market without delay. In a year of a heavy crop, vast quantities of these lemons would be shipped indiscriminately to an over-supplied market with what would necessarily be a devastating effect on prices. Nor would all such lemons be sold. Many would rot in the terminal markets for want of a customer. The green and silver lemons, however, would be held back to await better prices and a stronger market.

The largest single factor affecting demand for lemons is temperature (R. 169).⁸ Tree-ripe lemons must be shipped within a short time after picking whether temperature conditions are good or bad, whereas other lemons can await a more propitious market. When tree-ripe lemons are dumped on the market, the price for all lemons goes down. Appellants make the claim that tree-ripe and green lemons do not compete with one another, but to the consumer all lemons are the same. When the market is glutted, the price of all lemons is depressed. There is not one market for tree-ripes and another for greens.

It thus appears that the marketing disadvantage of tree-ripe lemons is not arbitrarily created by the

⁸ Price must be carefully distinguished from demand. The price for lemons is determined by the interplay of the forces of *supply* and demand.

lemon order, but is an inherent disadvantage existing independently of the order. This can hardly be said to be discrimination.

At pages 19-20 of the appellants' supplemental brief is given what purports to be an example of how the order operates. The hypothetical situation selected is wholly unrealistic and is designed to show a discrimination that would never exist in fact. For instance, each handler posited has exclusively green and tree-ripe lemons, respectively. But Chula Vista, the only appellant with a disproportionate share of tree-ripe lemons, is shown to handle only about fifty percent of tree-ripes (R. 184). The storage life of the tree-ripe lemons is given at thirty days, whereas that of the greens is given at the maximum of six months.⁹ The handler who has ten carloads of green lemons in store is presumed to hold them for the full six months, at which time, although more likely before, it will be necessary to divert them to byproducts. He is also presumed to have other lemons (including tree-ripes) to ship against them. If he had not, a situation which could hardly exist in fact, he would be able to ship no more than 9.7 carloads over the six-month period. The handler with ten carloads of tree-ripe lemons is presumed to have no green lemons against which he could ship the tree-ripes, which is likewise a situation remote from actuality. Instead of either of these improbable handlers, take Chula

⁹ The evidence shows that green lemons hold in store from four to six months, but that it is advisable to ship them within three or four months if they are to reach the consumer in good condition (R. 228).

Vista with its fifty percent of tree-ripes. Assume that it has ten cars in store, that its tree-ripes will last thirty days, and that one carload may be shipped each week for each ten in store.¹⁰ Since every wise handler disposes of his weaker fruit first, in the first thirty days Chula Vista would be able to dispose of approximately three and three-fourths of its five carloads of tree-ripe lemons. Only one and one-fourth carloads would be left to be marketed intrastate or sent to byproducts. Of the remaining five cars of green lemons, assuming a storage life of six months, 4.5 cars could be shipped. Thus, Chula Vista could ship a total of 8.25 cars as compared with 9.6 if all of its lemons were green. The difference is no greater than the natural economic disadvantage of tree-ripes in a free market.¹¹

Another claim of discrimination is made which is applicable only to Chula Vista. Evidence was proffered to show that the tree-ripe lemons handled by this association are of smaller than average size and that such lemons have their best market in the South especially in the months of April, May, and June, whereas the larger size lemons (usually green) have their best market in July, August, and September (R. 187, 191). The discrimination is said to exist in that the small size tree-ripe fruit with its short storage life and limited good marketing period is treated in the same manner as large green lemons which have

¹⁰ These are the same conditions used by appellants in their example.

¹¹ There would be less disparity if a shorter storage life is assumed for green lemons. See footnote 9, page 15.

a longer storage life and generally better marketing opportunity throughout the year. As a result Chula Vista claims it is unable to secure sufficiently large allotments to enable it to dispose of all its small fruit before the peak demand therefor passes (R. 187).

While the evidence shows that the South likes small lemons, the larger size lemons find a market there also (R. 161). In addition, all handlers have some small lemons to dispose of. Both tree-ripe and green lemons grow and must be marketed throughout the year (R. 120). Thus, all handlers compete for the Southern market in the sale of both their small and large lemons. The North prefers large size lemons but small lemons compete with them there (R. 121, 187). Comparative prices determine the extent of the competition in both the North and the South.¹² Proration and allotments are made effective when supply and demand conditions are such that the available market will not absorb all the available lemons at favorable prices. This is true whether the available market is in the South or elsewhere. It would neither be feasible to distinguish among lemons on the basis

¹² Demand in the South reaches a peak earlier in the season than demand in the North (R. 162). This is because it gets warmer there first. However, the peak picks of tree-ripe lemons also occur early in the season (R. 121). Thus, the proportion of the total available crop which is small size tree-ripe lemons is greatest when the South's demand is greatest. Since the heavy picks of green lemons occur later in the season, comparatively small numbers of such lemons are available for shipment to the South. This would seem to work out very equitably for handlers of a large percentage of small size tree-ripe lemons. Similarly the proportion of green lemons in the total available crop is greater when demand in the North reaches its peak.

of color or size,¹³ nor fair to exclude particular colors or sizes from particular markets.

If a situation occurs where a handler has a large proportion of small tree-ripe lemons and his allotments are too small to enable him to dispose of a substantial quantity of such lemons during the peak period of demand for them, the borrowing provisions of the lemon order (Order, Section 953.4 (h)), designed for just such contingencies, may be resorted to by the handler. If all other handlers are overstocked with small lemons, he will probably be unable to borrow, but if, as is more likely, all are not overstocked there is no reason to suppose that he will be unable to obtain loans. These may be repaid when the peak season for small lemons has passed. Moreover, the provision in the order for ten percent overshipments (Order, Sec. 953.4 (f)) will also offer some relief.

As the order operates, it is in a year of a large crop that all handlers must divert from interstate fresh-fruit channels some of their fruit. This applies as well to handlers of a large proportion of small tree-ripe lemons such as Chula Vista. The comparative figures with respect to storage and diversion by Chula Vista, proffered at page 189 of the record and reprinted at pages 20-21 of appellants' supplemental

¹³ If separate treatment is to be accorded to small size tree-ripe lemons, there would be no basis for failing to accord similar special attention to silver and light green lemons. In view of the fact that all groves produce varying proportions of lemons of each color in different years (R. 122), the difficulties of administering such an order would be insurmountable.

brief, leave out of account the fact that the 1940-41 crop was vastly larger than any previous one (see also R. 182, 200, 212, 231). As a result, the comparisons with other years are very misleading. Likewise, it should be recalled that in previous years Chula Vista had the advantage of a market supported by the voluntary proration of the California Fruit Growers Exchange.

The small size tree-ripe lemon has the same natural economic disadvantage as all tree-ripes, but in a somewhat more aggravated form. All lemons shrink while in store (R. 190), and the smallest lemons may shrink to the point where they are no longer marketable in fresh fruit channels. Shrinkage often depreciates the value of all lemons, for while it may slightly increase the price per box, there are more lemons to the box (R. 190-191). So far as the proffered evidence shows that the South will pay a premium price for the smaller size lemons (R. 163, 191), Chula Vista is less damaged by such shrinkage than the proffer of testimony would seem to indicate. Good merchandising practices may eliminate much of the potential loss in small size tree-ripe lemons. If allotments are filled first with the weaker lemons, leaving the stronger lemons to await future allotments, the quantity of fruit which would become unmarketable may be materially decreased.

Chula Vista has proffered no evidence to show that the actual, as opposed to the theoretical, operation of the order has caused it injury of which it has a right to complain. The real grievance of Chula Vista

is that the lemon order has prevented it from marketing all of the lemons that it otherwise could have marketed. But this is true of all handlers affected, and appellants recognize that this is a natural consequence of compulsory proration (R. 207).

Chula Vista has compared its interstate shipments in former years with its record in the first five months of proration (R. 182-184, 189-190).¹⁴ But in previous years, as has been shown, approximately ninety percent of the supply of lemons was voluntarily prorationed, and the crop during the five-month period in question was the largest in lemon history. The comparison, of course, shows that Chula Vista did market as fresh fruit a higher proportion of its crop in the preceding years than it did during the period of compulsory proration, but the comparison is unfair and does not show discrimination.

The statistical evidence offered to show that Chula Vista has not fared as well under compulsory proration as other handlers affected is also without force. Appellants' Exhibits C (R. 264) and D (R. 265) indicate that had it not been for overshipments, Chula Vista would have shipped as fresh fruit a slightly smaller percentage of its crop than the average for the industry. The record shows, however, that the various associations belonging to Mutual Orange Distributors had made very heavy shipments of lemons immediately

¹⁴ No effort was made to show the actual number of boxes of lemons marketed in fresh fruit channels in former years as compared with 1940-41, the first year of compulsory proration. Since 1941 was a year of an extraordinarily heavy crop, any other method of comparison with other years would be most deceptive.

prior to the beginning of compulsory proration, thus reducing their bases for the first several allotments (R. 289).¹⁵ Likewise the statistics are deceptive in that they do not show how much greater Chula Vista's allotments would have been had it not been for its heavy shipments in excess of allotments.¹⁶ This evidence does not show that Chula Vista has been forced to bear more than its fair share of the lemon surplus under compulsory proration, and no effort was made to show that Chula Vista has fared worse than others similarly situated.¹⁷ This can hardly be said to establish discrimination.

F. Appellants' claim of loss of business to the California Fruit Growers Exchange

Throughout the record, it is stated time and again that the effect of the lemon order will be to force the appellants out of business and create a monopoly in the California Fruit Growers Exchange (R. 175, 186, 210, 224, 237). This anticipated catastrophe has not yet come to pass. Nor has any evidence been proffered to show that it will other than the predictions of the officers of Mutual Orange Distributors and its member associations. Their reasoning as set forth in the record is that Mutual Orange Distributors and the California Fruit Growers Exchange are the two biggest

¹⁵ See p. 11 of this brief.

¹⁶ Overshipments would reduce the number of lemons in store and thereby reduce the prorate base.

¹⁷ There are ten other associations with orchards in the same area as Chula Vista. None of them is a party to this case and none of them belongs to Mutual Orange Distributors. See footnote 7, page 13 of this brief.

lemon marketing associations in the country, that the Exchange has more members and controls more lemons than does Mutual Orange Distributors, and, therefore, when the allotments of Mutual Orange Distributors are not sufficient to enable it to supply all its customers' needs they will be lost to the Exchange. The complete answer is that the members of the California Fruit Growers Exchange are likewise subject to compulsory proration under the order and cannot ship more than their allotments. It is impossible under compulsory proration for any one marketing association to acquire a monopoly because, as long as other associations have lemons available for shipment, no one association would receive allotments large enough to satisfy the demand. What really hurts the appellants is that under proration they are compelled to bear a fair share of the burden of any annual surplus of lemons, a load which has hitherto been carried by the members of the Exchange alone.

G. The effectiveness of proration

Proration has been effective. The report of the Lemon Administrative Committee (R. 256) shows that in 1941, the biggest crop year in history, price fluctuations were more gradual than they were the year before, although in 1941 many more carloads were shipped interstate. The fluctuations in 1941 were only slightly less gradual than the average for the years 1938-1940, all years of comparatively small crops.¹⁸

¹⁸ The 1938 production was 9,304,000 boxes; 1939, 11,106,000 boxes; 1940, 11,983,000 boxes; 1941, 17,099,000 boxes. Agricultural Statistics (1942), United States Department of Agriculture, 236.

Averages, however, even out severe fluctuations in individual years. Perhaps the most striking testimonial to the effectiveness of compulsory proration is that prior to 1941, in almost every year when there was a crop substantially larger than that of the preceding year, the total farm value of the greater crop was less than that of the smaller. This situation was sharply reversed in 1941, although the 1941 crop exceeded that of 1940 by the greatest margin on record.¹⁹

H. Appellants' claim of restriction generally on their methods of doing business

Appellants' Supplemental Brief (pp. 9, 22) attacks the lemon order on the ground that the evidence shows that appellants are especially injured when allotments are too small to enable them to pack at least two or three carloads at a time (R. 197, 229). They are, however, at no greater disadvantage than other handlers. For instance, the record shows that on the average each member association of the California Fruit Growers Exchange handles lemons for about 66 groves, against a figure of 77 groves for the average member of Mutual Orange Distributors (R. 8, 129). There is no basis for assuming that the allotments for the individual associations of the Exchange are any larger than those for the Mutual Orange Distributor associations, or that the former do not labor under the same conditions with respect to shipping carload lots as the latter.

The California Fruit Growers Exchange has member associations in every area in which appellants are

¹⁹ Agricultural Statistics (1942), United States Department of Agriculture, 236.

located. Its groves match appellants' kind for kind and place for place. Whatever appellants suffer or benefit under the lemon order, the individual members of the Exchange suffer or benefit in equal degree.²⁰ The numerous inferences in appellants' supplemental brief that the California Fruit Growers Exchange is more favorably treated under the lemon order than the appellants are wholly unwarranted.

The appellants have proffered evidence that prior to compulsory proration 90 to 95 percent of their interstate shipments were made pursuant to private sale, and that the effect of the order is to compel them to sell a larger percentage of their lemons through the auction markets (R. 157, 176). The opinion is expressed that this effect of the order will result in lower net returns to appellants (R. 176). However, the evidence demonstrates that the opinion is unfounded, for the prices received at appellants' private sales were for the most part determined by currently prevailing auction market prices (R. 158). Just how the lemon order operates to prevent appellants from continuing their private sales practices is not clear. It seems hardly credible that appellants, who before compulsory proration could market most of their lemons at private sale, can not continue to do so afterward. Even if the effect of the lemon order is to compel appellants to go into the auction markets where they meet the competition of the California Fruit Growers Exchange (R. 225), that does not show any discrimination. The appellants may not

²⁰ See footnote 7, page 13 of this brief.

complain that the order does not protect them from the hazards of lawful competition. *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939); *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 170-171 (1934). The California Fruit Growers Exchange competes with appellants in the private sale market.²¹ Insofar as appellants are unable to dispose of their fruit at private sale and must resort to auctions, they are in no different position from other handlers. Moreover, as stated above, appellants concede that frustration of their contracts by the lemon order would not make the order vulnerable under the Fifth Amendment of the Constitution (Appellants' Supplemental Brief, p. 3).

III. The applicable legal principles relating to appellants' claim of discrimination

There can be no unconstitutional discrimination when all who are similarly situated are treated alike. *Caskey Baking Co. v. Virginia*, 313 U. S. 117, 121 (1941); *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 424 (1937); *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527, 542 (1931). The evidence proffered by the appellants does not show that they are treated differently from other handlers under the lemon order.

The Fifth Amendment has no equal protection clause. The Supreme Court has clearly implied that before Federal legislation will be held to violate the

²¹ The Citrus Industry and the California Fruit Growers Exchange System, Circular C-121, June 1940, Farm Credit Administration, United States Department of Agriculture, 62.

due process clause of the Fifth Amendment on the ground that it is discriminatory, the discrimination would have to be more marked than would be necessary to invalidate similar state legislation under the equal protection clause of the Fourteenth Amendment. *Detroit Bank v. United States*, 317 U. S. 329, 337-8 (1943); *Currin v. Wallace*, 306 U. S. 1, 14 (1939); *Steward Machine Co. v. Davis*, 301 U. S. 548, 584 (1937).

Even in passing upon the question whether a state regulation is so discriminatory as to violate the Fourteenth Amendment, the function of the court is simply to determine whether it is possible to say that the legislative classification is *without any rational basis*. *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 594 (1939); *United States v. Carolene Products Co.*, 304 U. S. 144, 152 (1938); *Dominion Hotel v. Arizona*, 249 U. S. 265, 269 (1919). In *Steward Machine Co. v. Davis*, 301 U. S. 548, 584 (1937), the Supreme Court said that, even under the restrictions of the Fourteenth Amendment, a classification that has support in considerations of policy and practical convenience cannot be condemned as arbitrary. And it was stated in *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511-13 (1937), that administrative convenience and the feasibility of enforcement may alone be a sufficient basis for classification. All this means that unless appellants have succeeded in showing, and the burden is upon them, that the classification adopted by the lemon order is wholly without reason or support in considerations of policy or administrative necessity, they have failed to make out a defense. It is submitted that

appellants have fallen far short of success by this test.

In considering the evidence proffered by appellants, it must be remembered that a particular method of classification cannot be condemned because another method more nicely adjusted to account for individual differences might have been chosen. The legislature is not required to make meticulous adjustments in order to avoid incidental hardships. *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 424 (1937). Nor is the validity of an Act of Congress to be refused application by the courts as arbitrary, capricious and forbidden by the due process clause merely because it is deemed in a particular case to work an inequitable result. *Wickard v. Filburn*, 317 U. S. 111, 129-130 (1942).

To deny the legislature the power to classify according to general considerations would be to deny the power of classification altogether. For it is always possible by analysis to discover inequalities as to some persons embraced within a specified class. *Miller v. Wilson*, 236 U. S. 373, 382 (1915). See also *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911). So when a regulation embodies a plan generally fair and equitable, particular cases of inequality or hardship that may arise in the course of its ordinary application must be borne. *Dominion Hotel v. Arizona*, 249 U. S. 265, 269 (1919).

Thus, even if appellants had been successful in their attempt to show that the classification adopted by the lemon order may work an inequity under certain

circumstances, no valid defense to the complaint would have been made out. The lemon order applies the equitable principle that all handlers shall share in the burden of any surplus lemon crop. It has sought to distribute that burden evenly. The Constitution does not require that this be done with mathematical precision, or that every possible individual hardship be eliminated.

IV. The district court followed the direction of the act in excluding the evidence proffered by the appellants to show discrimination in the lemon order

The appellee's argument on this point, as contained in its original brief, is supplemented herein in the light of cases since reported and of the oral argument which took place on October 15, 1943.

A. The evolution of the statutory direction

The lemon order is an excellent example of the quota type of governmental regulation which has come into prominence during the last decade. A total advisable quantity of lemons for weekly shipment is determined for allotment among handlers whenever the relation of supply to demand is such as to call for proration. The order is characterized by a symmetry which makes it extremely sensitive to the slightest disturbance in operation. Even an isolated overshipment of an allotment may not be viewed with indifference. The unfair advantage thus gained by the violating handler is such as to constitute a strong inducement to his competitors to commit similar violations. Clearly the lemon order is unworkable unless all who are subject to it comply.

It is eminently reasonable, therefore, that the Act requires a handler to comply with his allotment pending the resolution of any complaint he may have with respect to the impact of the order upon him. The Secretary of Agriculture is charged by the Act with the issuance and administration of the order. The order was issued by him, as required by the Act, only after a public hearing at which all interested persons were permitted to be heard (Act, Sec. 8c (3), (4)). As the issuing authority, the Secretary is also required to hear the complaint of any handler, and a ruling thereon adverse to the handler is subject to judicial review (Act, Sec. 8c (15)). The specific provisions of the Act that the pendency of such a complaint shall not hinder the enforcement of the regulation against the handler, and that any enforcement proceeding shall abate upon the rendition of a final decree in the review proceeding, indicate clearly the purpose of the Congress to require compliance on the part of any handler pending the determination of his complaint (Act, Sec. 8c (15) (B)). In this way, the dual purpose of affording a remedy to the complaining handler and of keeping the operation of the order intact in the meantime is served.

Proration of oranges, similar in every substantial respect to the proration of lemons, was in effect under the licensing system of the Agricultural Adjustment Act of 1933 (48 Stat. 31, 7 U. S. C. 601 *et seq.*). The amendments of August 24, 1935, 49 Stat. 750, in substituting orders for licenses and providing in detail for the proration plan, adopted the administrative experience gained under the act prior to its amendment.

These amendments were carried forward in the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted with further amendments the important marketing provisions of the Act of 1933. The Act of 1933 was one of the first of the extensive regulatory measures enacted to combat the grave economic depression which had stagnated the business of the Nation. The situation was almost comparable in its gravity to the war-time conditions preceding the enactment of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. 901 *et seq.*), which requires merchants and landlords subject to price and rent regulation, respectively, to comply therewith pending an administrative determination of their complaints, subject to judicial review. This rule of compliance is expressly provided for in that act. It is embedded by necessary implication in the act now under consideration. The rule is complementary to the general principle that, where administrative relief has been provided for, any complaint with respect to a regulation must be submitted to the administrative process before resort to the courts.

B. Cases arising under the Emergency Price Control Act

The rule of compliance first and litigation afterward has been invoked in many cases arising under the Emergency Price Control Act. The Supreme Court of the United States, in *Lockerty v. Phillips*, 319 U. S. 183 (1943), held that the provisions of the act conferring exclusive jurisdiction upon the Emergency Court of Appeals to determine the validity of a price or rent regulation in a review of an administra-

tive ruling denying a protest against the regulation, had the effect of depriving the district courts of the United States of jurisdiction to determine such validity in an action to restrain criminal prosecution of a merchant for violating a price order. The Court left open the question of the scope of defense in an enforcement or criminal proceeding brought under the act. The question thus left open is probably now before the Supreme Court in *Rottenberg v. United States*, in which certiorari was granted on November 8, 1943, 12 L. W. 3161, to review a decision of the United States Court of Appeals for the First Circuit, 137 F. 2d 850, and in *Brown v. Willingham*, in which the Court noted probable jurisdiction on November 15, 1943, 12 L. W. 3169, to review a decision of the District Court of the United States for the Middle District of Georgia, 51 F. Supp. 597. In the *Rottenberg* case, the Court of Appeals held that the defense that the price regulation was arbitrary was not open to the defendant in a criminal prosecution. In the *Willingham* case, the contrary ruling was made that a defense based upon the invalidity of a rent regulation could be interposed by the landlord in an enforcement action against him by the Price Administrator.

The rule of the *Rottenberg* case has been applied in many other cases for the enforcement of price and rent regulations issued under the Emergency Price Control Act: *Henderson v. Burd*, 133 F. 2d 515 (C. C. A. 2d, February 9, 1943); *Henderson v. Kimmel*, 47 F. Supp. 635 (D. C. Kansas, October 23, 1942)-Three-

judge court, with Judge Phillips, Circuit Judge, presiding), each involving an action to enjoin violations of a regulation; *United States v. C. Thomas Stores, Inc.*, 49 F. Supp. 111 (D. C. Minn., February 26, 1943); *United States v. Sosnowitz & Lotstein*, 50 F. Supp. 586 (D. C. Conn., March 25, 1943); *United States v. Friedman*, 50 F. Supp. 584 (D. C. Conn., March 25, 1943); *United States v. Slobodkin*, 48 F. Supp. 913 (D. C. Mass., March 2, 1943); *United States v. Central Packing Corp.* 51 F. Supp. 813, 12 L. W. 2198 (E. D. New York, September 13, 1943), each involving criminal prosecution for the violation of a regulation under the act, and *Brown v. Lee*, 51 F. Supp. 85 (S. D. Calif., August 12, 1943—Three-judge court, with Judge Stephens, Circuit Judge, presiding), in which the defendant in a suit to enjoin violations of a rent regulation was held not entitled to counterclaim for affirmative relief against the regulation and in which *Henderson v. Kimmel*, *supra*, was cited with approval. Contrary decisions are *Brown v. Wyatt Food Stores, Inc.*, 49 F. Supp. 538 (N. D. Tex., March 8, 1943); *Brown v. O'Connor*, 49 F. Supp. 973 (N. D. Tex., May 14, 1943), and *Payne v. Griffin*, 51 F. Supp. 588 (M. D. Ga., August 30, 1943), the last-mentioned case being a companion case below with *Brown v. Willingham*, *supra*.

In *Brown v. Hecht Company*, 137 F. 2d 689, 695 (D. C. App., July 22, 1943, certiorari granted October 18, 1943, 12 L. W. 3127), it was held that the district courts are *required* by the express terms of the price control law to enjoin violations of price regulations

notwithstanding the lack of wilfulness in past violations and the mere probability of innocent future ones. The court said, "The limitation upon the court's discretion is unusual, but the situation which evoked it is extraordinary." Judge Eicher, in concurring, said "If specific regulations cannot be complied with, the place to test them is not in this proceeding but in the forum that Congress has provided * * *."

C. Rationalization of the statutory direction

The principle contended for above is rationalized by the observation that the administrative process on complaints with respect to a regulation should be permitted to go on to its natural conclusion before resort to the courts, with consequent avoidance of the necessity of having the administrator establish the validity of the regulation in every action for civil enforcement or criminal prosecution under the act, and that any incidental hardship or inconvenience to the complainant should be borne in the interest of the greater public good resulting from compliance with the regulation until it is set aside or amended in an orderly way. See *Rottenberg v. United States*, *supra*, 856-857.

D. Cases relied upon by appellants are inapplicable

In contending that the lower court should have received and considered the proffered evidence relating to the discriminatory operation of the lemon order against them, the appellants rely largely upon *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38

(1936), and *Denver Union Stock Yard Co. v. United States*, 57 F. 2d 735 (1932 Three-judge court). Each of these cases involved a statutory proceeding to set aside an order of the Secretary of Agriculture, issued pursuant to the Packers & Stockyards Act (7 U. S. C. 181 *et seq.*), and the hearing was upon the record made before the Secretary. In each case the administrative order was challenged as confiscatory. The order was upheld in the *St. Joseph* case and set aside in the *Denver* case.

An order made by the Secretary of Agriculture under the same act, following the decision in the *Denver* case, was later upheld against the charge of confiscation in *Denver Union Stock Yard Co. v. United States*, 21 F. Supp. 83 (1937-Three-judge court), affirmed 304 U. S. 470 (1938). The case was heard upon the record before the Secretary and the findings of the Secretary were accorded controlling weight. The District Court said that the claim of confiscation was supported by legal conclusions only and not by facts, and the Supreme Court stated that "plainly the evidence is insufficient to require or warrant a finding" of confiscation. See also *Acker v. United States*, 298 U. S. 426 (1936).

In each of the cases above, the Court was reviewing an administrative ruling upon the basis of the administrative record. The advantage of the administrative proceedings in assembling the constitutional or jurisdictional facts was clearly recognized. The Court, while apparently exercising its own independent judgment on these facts, accorded considerable,

and sometimes controlling, weight to the findings made by the administrative body. In each case, the Court regarded the administrative process as an integral part of the judicial process. It was in connection with a judicial review of the ruling of an administrative body that the Supreme Court approved, in *Crowell v. Benson*, 285 U. S. 22 (1932), a trial *de novo* as to the jurisdictional and constitutional facts determined by the administrative body.²²

The appellants have presented their complaints to the Secretary of Agriculture. The Secretary has made a ruling thereon. A judicial review of this ruling is now pending in the same district in which the instant case arose. The District Court has remanded the case to the Secretary for additional evidence and findings upon all the issues involved. The issues involved comprise not only the complaint of discrimination presented in the instant case, but other objections to the validity of the lemon order. The Act provides that the proceeding in the instant case shall abate upon the rendition of a final decree in the judicial review proceeding, and the judgment in the instant case, which consists of an injunction against violations of

²² Mr. Justice Brandeis filed a vigorous dissent in which the present Chief Justice and Mr. Justice Roberts joined. An interesting discussion of the present vitality and scope of the rule is contained in *Pike and Fischer, Administrative Law*, Vol. 2, pp. 146-172. See also *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 345 (1937); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50 (1938); *Newport News Shipbuilding & D. D. Co. v. Schlauffler*, 303 U. S. 54, 57 (1939), and *Lockerty v. Phillips*, 319 U. S. 183 (1943), cited in appellee's original brief at pages 14-15.

the lemon order by the appellants, expressly provides that it shall continue in effect only until further order of the District Court or until such time as a judgment determining that the lemon order is invalid or inapplicable to the appellants is entered in the District Court in the review proceedings.

The cases discussed above, and relied upon by the appellants, strengthen rather than weaken the view that the appellants should not be permitted in this case to by-pass the administrative determination of their complaints. The constitutional-fact doctrine serves only to illustrate the fullness of judicial review of administrative rulings of a quasi-judicial nature. There is nothing in the doctrine which militates against the constitutionality of a statutory direction that the validity of a regulation may not be determined in a civil or criminal prosecution for its violation.

CONCLUSION

It is respectfully submitted that the District Court acted properly in refusing to consider the evidence proffered by the appellants relating to the discriminatory operation of the lemon order against them, and that, in any event, such evidence is insufficient

in law to support the defense of discrimination. The judgment of the District Court should, therefore, be affirmed.

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No. 10266

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

LA VERNE CO-OPERATIVE CITRUS ASSOCIATION, a corporation; GLENDORA CO-OPERATIVE CITRUS ASSOCIATION, a corporation; VENTURA ORANGE AND LEMON ASSOCIATION, a corporation; WHITTIER MUTUAL ORANGE & LEMON ASSOCIATION, a corporation; INDEX MUTUAL ASSOCIATION, a corporation, and CHULA VISTA MUTUAL LEMON ASSOCIATION, a corporation, organized and existing under the laws of California.

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF.

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Appellants,

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Appellee.

APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF.

The Government argues in its Supplemental Brief, I, that the separate defense in each answer does not state a valid defense, II, that the excluded evidence does not support appellants' claim of discrimination, IV, that the District Court followed the direction of the Act in excluding the proffered evidence. Under a separate heading, III, it discusses the applicable legal principles relating to appellants' claim of discrimination. In this brief we follow this order of discussion.

I.

Defendant's Pleadings.

The question is whether the separate defense states a valid defense. We think it does.¹

But if the pleading is technically insufficient, appellants should be given an opportunity to amend:

(a) because no attack was made on the sufficiency of the pleading in the District Court;

(b) because the issues were tried (that is to say, stipulations of fact were admitted and other evidence excluded) on the theory that the issue was sufficiently pleaded.

Discussing rule 15 (b) of the Federal Rules of Civil Procedure, Professor Moore has this to say:²

“Rule 15 (b) can be separated into two parts. First, if issues are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”

The same author also says:

“At the trial, Rule 15 enables the case to be litigated on the merits. It does this in two ways:

(a) in effect pleadings are automatically amended to conform to proof on issues tried by express or implied consent; (b) if objection is made to the trial of an issue not raised by the pleadings, an amendment is to be allowed to raise the issue, unless the

¹See *Brock v. Superior Court*, 12 Cal. (2d) 605, for a similar pleading upheld by the Supreme Court of California. This case is discussed on pages 11 to 13 of appellants' supplemental brief and is there referred to as practically on “all-fours” with the instant cases. It is not referred to in appellee's supplemental brief.

²Vol. 1, page 807, *Moore's Federal Practice* (1938); see, also, *Haskins v. Roseberry* (C. C. A. 9, 1941), 19 Fed. (2d) 803-805.

objecting party can show that he would be actually prejudiced, and even in that case the court may permit an amendment and grant a continuance, so that the objecting party can meet the new issue, and thus obviate the prejudice which he would suffer if obliged to litigate the issue at that time. The sporting element in litigation is eliminated.”³

“Proper pleading” said Mr. Justice Black, speaking for the court in *Maty v. Grasselli Chemical Co.*, 303 U. S. 197, 210; 82 L. Ed. 745, 748, “is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment.”

(c) For the purposes of the appeal this court should try the constitutional issue as though it were properly pleaded, assuming, of course, that the pleading is defective and that the defect is one which could be cured by amendment.⁴

(d) It has been held in the Second Circuit⁵ that where the court recognizes that a cause of action (the same principle should apply to a defense) *might* exist, it should not have summarily dismissed the complaint, but should permit the action to go to trial with proper amendments, *even though no request to amend was made*. And the District Court for the Southern District of California (per Yankwich, J.) has held that a party should be denied relief “only when under the facts proved he is entitled to none.”⁶

³Vol. 1, page 786, *Moore's Federal Practice*.

⁴Vol. 1, p. 808, *Moore's Federal Practice*; *Gulf Smokeless Coal Co. v. Sutton, Steele & Steele* (C. C. A. 4, 1929), 35 Fed. (2d) 433, 439 and cases cited.

⁵*Downey v. Palmer* (C. C. A. 2, 1940), 114 Fed. (2d) 116.

⁶*Nester v. Western Union Telegraph Co.* (D. C. S. D., Cal., Cent. Div., 1938), 25 Fed. Supp. 478, 481.

What has been said is not to be taken as an admission that the pleading of the special defense is defective. To the contrary, we believe it raises the constitutional issue adequately as against an attack in the nature of a general demurrer. But should this court be of the opinion that the pleading is insufficient, then we are entitled to, and we request leave to, amend. This request we could not make in the trial court, not being there advised that the sufficiency of the answer was challenged.

Appellee correctly says (Appellee's Supp. Br. p. 6) that the discrimination is said to consist in placing green and tree-ripe lemons in one classification for the purpose of proration. Appellee insists that this is a matter peculiarly for legislative or administrative determination. With this we cannot agree. As pointed out in our Supplemental Brief (pages 7, 8), this court held in the *Hudson-Duncan* case⁷ that price-fixing, when employed by Congress, as well as by the state legislatures, is gauged by the same standard as other regulations in the exercise of governmental powers, namely, the standard of reasonableness. Congress has recognized the standard of reasonableness and the standard of equitable apportionment of the crop among producers and handlers in Section 608 (c) (6) of the Act.⁸ The vice is not in the Act, but in the Order. Appellee says (Appellee's Supp. Br. p. 6) that the separate defense does not "hint" of a failure to comply with the provisions of the Act and that we first make the contention in our Supplemental Brief. Granted. There for the first time, and by direction of this court, we were called upon to argue either the sufficiency of the pleading or of the proffered evidence. In the separate defense we

⁷*Wallace v. Hudson-Duncan & Co.* (C. C. A. 9, 1938), 98 Fed. (2d) 985, 992-3.

⁸Section 608 (c) (6) (B) (C) and (D), Title 7, U. S. C., A.

pleaded the ultimate facts with respect to unreasonable and arbitrary discrimination. We have referred to the provisions of the Act in this respect only as showing that Congress has expressly recognized the standard of reasonableness and the standard of equitable apportionment required by the Constitution and referred to in the opinion of this court in the *Hudson-Duncan* case. Appellee does not deny the validity of the argument. It cannot deny it. Neither can it be said that the order provides "a uniform rule" or apportions quantities which may be marketed equitably among all producers or handlers as is required by the Act.

Appellee further asserts that "no facts are alleged to show that appellants are treated or affected differently from other handlers" (Appellee's Br. p. 5). We cannot agree. Co-operative marketing organizations (defendants among others) are merely instrumentalities of their producer members. Whatever injures the handler injures its members, and whatever injures some or any of its members injures it. There are handlers who have producer members producing tree-ripe lemons in quantities exceeding their production of greens. Take the testimony of Mr. Riesland, manager of defendant Chula Vista Lemon Association. About 15%, he said, of the lemons handled by his house are green, 22% silver and between 60% and 65% yellows (tree-ripe).⁹ Among producers whose crops are very largely tree-ripes is R. C. Verity, who testified at the Promulgation Hearing that his family produced from slightly over 200 acres in Corona, and that about 50% of their lemons are tree-ripes.¹⁰

⁹Page 562, transcript of testimony at promulgation hearing. This transcript was offered in evidence by the government and denied admission. [Rec. 152.]

¹⁰*Ibid.*, pages 650-1.

Mr. Nicholas, a producer in San Bernardino County, testified:

“In our district our lemons get tree-ripe early in the spring, much earlier, in fact, than lemons in the coastal areas in the Northern counties, *so that we have no summer fruit available for shipment.*” (Emphasis added.)¹¹

On the other hand, some handlers have less than 5% tree-ripes.¹² In 1939 American Fruit Growers, on its 144-acre lemon ranch at Corona, produced 47½% tree-ripes and only 9.32% green lemons.¹³

Now it is manifest that a handler, or producer, with 50% tree-ripes is not given an equitable apportionment of the total crop as against a handler, or producer, who has 5% tree-ripes, where, as is the case under the order, the life expectancy in storage is made the basis of allotments and tree-ripes have a storage life of approximately thirty days, whereas greens will keep in storage for as long as six months.

Appellee says (Appellee's Supp. Br. p. 5) that it appeared from the proffered evidence “that appellants intended to establish that they are so differently situated from other handlers that similar treatment amounted to discrimination against them.” This statement is not correct. What appellants “intended to establish,” and the proffered evidence tends to prove, is, that similar treatment of tree-ripe and green lemons is unreasonable, arbitrary and unjust. This for the reason that their widely variant keeping-qualities necessitate a differential permitting marketing of larger weekly quantities of tree-ripes,

¹¹*Ibid.*, page 859.

¹²*Ibid.*, page 553.

¹³*Ibid.*, pages 443-445.

as against a storage base, than is permitted for greens. In the absence of such differential, tree-ripes, although just as good in quality as greens, are discriminated against. It certainly needs no argument to prove that similar treatment of dissimilars is just as unreasonable and discriminatory as is dissimilar treatment of similars.

The fact, if it be a fact, that there are other handlers and producers in the same situation as defendants, or those of defendants handling large quantities of tree-ripes,¹⁴ does not justify penalizing producers of tree-ripes and favoring producers of greens.

We have referred to this evidence in connection with our discussion of the validity of the separate defense because by offering the record of the promulgation hearing and by failing to interpose an appropriate motion or objection in the nature of a demurrer to the evidence, the government impliedly consented to the trial of the constitutional issues, thereby impliedly conceding the validity of the separate defense. In this connection the following from the opinion of Chief Justice Hughes for the court in *Borden's Farm Products Co. v. Baldwin*,¹⁵ is pertinent:

"We have frequently said, especially in confiscation cases, that a mere general allegation of repugnance to the Fourteenth Amendment is not enough to state a cause of action to restrain the enforcement of a statute or administrative order (citing cases). But in determining the sufficiency of the allegations of the complaint we cannot fail to take note of the nature and effect of the legislative action which is assailed."

¹⁴Defendant Glendora Co-operative, for instance, handles approximately 50% to 60% tree-ripes and *light* silvers, which are practically the same as tree-ripes. *Ibid.*, pages 628-9.

¹⁵293 U. S. 191, 203; 79 L. Ed. 281, 285.

II.

Evidence.

Appellee asserts that only Chula Vista has attempted to show discrimination. We beg to differ. It is true that the printed record of the testimony does not show that other of the defendants handle a large percentage of tree-ripes, but there is evidence to that effect in the record of the promulgation hearing with respect to both Glendora Co-Operative and LaVerne Co-Operative.

Glendora Co-Operative handles 50% to 60% tree-ripes and *light* silvers, the latter being practically the same as tree-ripes.¹⁶

Of the lemons handled by LaVerne Co-Operative from January 15 to April 15, 1940, 79.46% were tree-ripes and *light* silvers; from April 15 to July 15, 60.93%.¹⁷ After July 15 there are few tree-ripes in storage or in the market.

So far as the evidence shows the only defendant handling less than 50% tree-ripes and *light* silvers is the Ventura association.¹⁸ Appellee is perhaps correct in saying that Chula Vista is the only defendant (shown) to handle a large percentage of *small* tree-ripes, but large or medium tree-ripes will not keep in storage any longer than small tree-ripes.

Appellee asserts (without any supporting evidence) that Mutual Orange Distributors and its member associations "reaped the benefits" of the voluntary proration adopted by California Fruit Growers Exchange, "without bearing any of its burdens." This charge has repeatedly been made and as often refuted. For instance, Mr. Teague,

¹⁶Transcript of evidence at promulgation hearing, pages 628-629.

¹⁷*Ibid.*, page 612.

¹⁸*Ibid.*, page 553.

president of the Exchange, when asked at the promulgation hearing to assume that "the independents" have eliminated as much fruit as the Exchange, replied, "Well, you just can't make that assumption. They just don't do it."¹⁹ But Mr. Teague also testified that for the past 15 years (prior to the year 1940) the producers marketing through the Exchange eliminated from fresh fruit channels an average of over 19%.²⁰ Again he testified, "We were only obliged to eliminate an average of about 20% over a period of some years."²¹ Exhibit 26 at the promulgation hearing²² shows that elimination by the associations marketing through Mutual Orange Distributors (including defendants) average 26% for the seasons 1934-5 to 1938-9 inclusive. How then, can it be said that "Mutual Orange Distributors and its member associations reaped the benefits of proration without bearing any of the burdens"? The inference is not as appellee would have it (Appellee's Supp. Br. p. 8), that the steady (*sic*) annual increase in the Mutual Orange Distributors' percentage of total lemon shipments²³ was in large part, or at all, due to any artificial advantage accruing to its members by reason of the voluntary prorate. Rather it may, indeed must, be inferred that the increase was due to Mutual Orange Distributors handling a larger percentage of the total crop. More producers marketed through it and fewer through the Exchange, or, putting it differently, it handled a larger percentage of the total crop.

Since the evidence at the promulgation hearing proves that Mutual Orange Distributors and its member associations eliminated at least as much as the Exchange houses,

¹⁹*Ibid.*, page 413.

²⁰*Ibid.*, pages 305-306.

²¹*Ibid.*, page 406.

²²*Ibid.*, pages 1106 & 1108.

²³Record 288.

the inference which appellee advances is both unjustifiable and gratuitous.

It is of interest to note that Mr. Teague also testified that if non-Exchange handlers eliminated the same percentage as the Exchange (the evidence shows that defendants eliminated a larger percentage) "there would be no need of a prorate."²⁴

Appellee says, on page 9 of its Supplemental Brief, that nothing in the lemon order requires appellants to ship as fresh fruit, lemons which are not in condition for marketing. It is true that the order does not, in terms, require the shipment of lemons not in prime condition, but that is the natural effect of the order.

To illustrate: The peak of lemon production is in the (so-called) winter months. About 50 per cent of the entire season's production is picked during the four months of January, February, March and April. On the other hand, the greatest consuming demand is ordinarily from May first to the end of September. During the months of January to April, inclusive, the picks are ordinarily double the consumption. One of the functions of storage is to adjust the picks and hold lemons for the greater market demand.²⁵ Lemons normally sell at considerably higher prices from May 1st to September 30th than at other times.²⁶ Of the lemons sent to by-products all but about 5% are, or have been if they were properly handled, commercially marketable in fresh fruit channels. In other words, not to exceed 5% ordinarily would be cullage.²⁷ It is, naturally, the aim of every shipper to

²⁴Transcript of evidence at promulgation hearing, page 413.

²⁵*Ibid.*, pages 161-162.

²⁶*Ibid.*, page 162.

²⁷*Ibid.*, page 197.

sell the largest percentage of lemons which it can during the times of highest prices, that is, from May 1st to September 30th.²⁸ The market for small-sized lemons in substantial quantities is limited to the months of April, May, June and July. The demand for 300's and 360's is more or less stable.²⁹ There is a great difference as between market areas as to the size which is customarily desired by the trade. Certain areas want all 300's and larger; others 360's and 432's; others want only 432's and 490's; and still others want even smaller.³⁰

The man who can bring his lemons to a large size in a green condition has a distinct advantage over producers who cannot.³¹ In what does this advantage consist? The answer is obvious. Manifestly it is to the advantage of handlers under prorate to keep their lemons in storage for as long as possible in order to increase the storage base against which allotments are made, and this applies to greens as well as to tree-ripes and silvers, but tree-ripes must be picked before they decay and must be shipped within shorter time after picking.³² Since the weekly allotments make no distinction between lemons of diverse keeping qualities, it is but natural that tree-ripes (and silvers) should be held for as long as possible in storage in order to reduce the differential in allowable shipments, thus reducing by-products elimination. It follows that handlers having a large percentage of tree-ripes must either ship many of them after they have reached their prime, or not ship them at all.

²⁸*Ibid.*, pages 202-203.

²⁹Record page 191.

³⁰Transcript of evidence at promulgation hearing, pages 189-190.

³¹*Ibid.*, page 211.

³²Mr. Powell, general manager of the Exchange, testified that 30 days is a better time to hold tree-ripes than any longer period; transcript of evidence at promulgation hearing, page 198.

Appellee (Appellee's Supp. Br. p. 13) asserts that the disadvantage resulting to producers of tree-ripes by reason of insufficient allotments to enable shipment of all of them during their comparatively short storage life "is merely a reflection of what they would suffer in a free market." Not only is there no evidence to support this assertion, but the reverse is true.

Appellee admits (Appellee's Supp. Br. p. 14) that peak picks of tree-ripes which occur early in the season must be moved to market without delay, but it says, "in a year of a heavy crop, vast (*sic*) quantities of these lemons would be shipped indiscriminately (*sic*) to an over-supplied market with what would necessarily be a devastating effect on prices." There are at least two answers to this much-to-be-deprecated disaster. First: There is not a shred of evidence to show that at any time in the past tree-ripes have been shipped in *vast* quantities, or that they have been shipped to an *over-supplied* market, or that they have been shipped *indiscriminately*, or that shipments of tree-ripes have had a *devastating* effect on prices. In short, the horrendous picture painted by appellee is made out of whole cloth. The second answer is that the government in conceding the disadvantage of tree-ripes, even in a free market, has reinforced our contention that Order No. 53 discriminates against producers and handlers of tree-ripes in favor of producers and handlers of greens. True, no packer handles tree-ripes or greens exclusively. But, to the extent that they handle a larger percentage of tree-ripes than other packers, they are discriminated against. Since, as appellee admits (Appellee's Supp. Br. p. 13), a longer period of time will elapse before greens deteriorate in storage than is the case with tree-ripes, the application of identical allotments to tree-ripes and greens permits handlers with a large percentage of greens in storage to ship—not only more lemons—but

more tree-ripes, against a storage base, than can be shipped by the handler with a large percentage of tree-ripes in storage. This is illustrated by the hypothetical example given on pages 19 and 20 of our Supplemental Brief.

Appellee says that this example is “wholly unrealistic” (Appellee’s Supp. Br. p. 15). The example, of course, was merely illustrative. The criticism is hypocritical. In the first place, we are entitled to assume a storage life of six months for greens, because the prorate allotments are based upon the estimated storage life, not on the time when the lemons are in prime condition for marketing. Perhaps we should take a maximum of six weeks for tree-ripes, although their average life is nearer thirty days. If, however, we take one and a half months for tree-ripes as against six months for greens, the differential is but little less.

The counter hypothesis stated by appellee (Appellee’s Supp. Br. p. 16) is of no value as an illustration, since it assumes that the five carloads of tree-ripes which serve as a storage base for allotments will themselves be shipped to the extent of three and three-fourths carloads. This is a false assumption, because if any part of the lemons constituting the storage base are shipped, the storage base is proportionately decreased. A handler cannot have lemons in storage to be counted as a base for allotment if he has already shipped them, and the storage count is made every two weeks.³³

Let us take another example based on proffered evidence: Defendant Glendora Co-Operative handles 50% to 60% tree-ripes and light silvers, the latter being prac-

³³Record, page 40.

tically the same as tree-ripes.³⁴ Defendant Ventura Orange & Lemon Association handles less than 5%.³⁵ Both are defendants, but may nevertheless be taken as examples, the one of a district where the percentage of tree-ripes is large, the other where it is not. There is—there can be—no escape from the conclusion that the Ventura association can ship substantially more lemons as against an equal number of cars in storage than can Glendora. Even if we take the minimum advisable storage suggested by appellee (Note 9, Appellee's Supp. Br. p. 15) of three months, and the maximum advisable time which Mr. Powell of the Exchange gave for tree-ripes (30 days),³⁶ we have a result which is palpably unfair, for, as against an equal number of lemons in storage, the Ventura association has 95% of greens which are included in its bi-weekly count, and only 5% tree-ripes, whereas Glendora has 50% of each (counting light silvers as tree-ripes).³⁷ Under this example the Ventura association can ship 45% more lemons against its base than can Glendora Co-Operative.³⁸ If we use six months as the storage life for greens and 30 days for tree-ripes, the differential in favor of greens is better than 70%.

Appellee says (Appellee's Supp. Br. p. 18) that if a handler has a large proportion of tree-ripes and his allotments are too small to enable him to dispose of a substantial quantity during the peak period of demand, the borrowing provisions of the Order may be resorted to.³⁹ Also

³⁴Transcript of evidence, promulgation hearing, pages 628-629.

³⁵*Ibid.*, page 553.

³⁶*Ibid.*, page 198.

³⁷While the testimony is that Glendora has 50% to 60% of tree-ripes and light silvers, we take the smaller percentage for purposes of this example.

³⁸For convenience we count 4 weeks to a month.

³⁹Order, Section 953.4(h).

that the provision for over-shipments⁴⁰ will offer some relief. These provisions furnish no relief or substantial relief. Under the borrowing section the borrower must pay back his borrowings during the same season. It is not to be supposed that the lender will accept in return for lemons loaned, lemons which are inferior or have a shorter storage life than those loaned. Hence, the borrower would merely borrow from Peter to pay Paul. Neither does a ten per cent, or one carload, overshipment in one week, which must be deducted from the following week's shipments, help any, as is self-evident.

If tree-ripes are borrowed (we are not here concerned with borrowings of greens), then the borrower must return tree-ripes and he has gained nothing, or he must return silvers or greens, in which event he is worse off than as though he had not borrowed at all. This thought was picturesquely stated by Mr. Nicholas, an Exchange grower, who testified at the Promulgation Hearing, as follows:

"Now, there is provision, I am aware, for borrowing prorate, but from our experience in the Redlands-Highland house, it is awfully easy to borrow and it is practically impossible to pay back, when you have a prorate of a part of a car, don't even have a whole car to pay back, so it is worse than the man who gets into the hands of the loan sharks, because you just can't pay back what you borrow."⁴¹

Appellee says (Appellee's Supp. Br. p. 22):

"What really hurts the appellants is that under proration they are compelled to bear a fair share of the burden of any annual surplus of lemons, a load

⁴⁰Order, Section 953.4(f).

⁴¹*Ibid.*, pages 861-862.

which has hitherto been carried by the members of the Exchange alone.” (Emphasis added.)

This bit of special pleading for the Exchange would be understandable if it had been voiced by that organization, but its adoption by counsel for appellee is surprising in the face of proffered evidence hereinbefore referred to, proving it false.

Mutual Orange Distributors handles about 8% of the total lemon shipments [Record p. 160]. During the period from June 1 to November 1, 1941, while the Order was in effect, the industry shipped in interstate commerce 10,295.02 cars [Record p. 264]. Under the Order, Mutual Orange Distributors was permitted to ship during this period 505.63 cars, or 4.9% [Record p. 264]. During the corresponding period in the year 1940, it shipped in interstate commerce 615 cars out of a California total of 8217, or 7.48% [Record pp. 176, 289]. As a result of proration, therefore, the percentage of Mutual Orange Distributors as against total California shipments was 65% less. From June 1 to November 1, 1941, the industry shipped in interstate commerce 10,295 cars, while in the corresponding period of 1940 it shipped 8183 cars, or an increase of more than 25% [Record 257]; yet during the same period Mutual Orange Distributors was allowed to ship only 505.65 cars [Record p. 264] as against 615 cars in the corresponding period of 1940 [Record p. 289], or a reduction of 17.8%. The figures set forth on page 9 of Appellee's Supplemental Brief show that the 1940-1941 crop was about 50% higher than the 1939-1940 crop, but Chula Vista's stor-

age rose from an average of 6193 boxes for the period from 1935 to 1940 inclusive, as of September 1st, to 53,150 boxes on September 1, 1941, or almost nine times as much. Surely this result is inequitable, unreasonable and unnecessary.

The proffered evidence should be tested by the same rules that apply to a motion for a directed verdict or a judgment n.o.v. under Rule 50 of the Rules of Federal Procedure, or a motion for involuntary dismissal under Rule 41(b). This being so, all facts that the defendants' evidence reasonably *tends* to prove and all inferences that reasonably may be drawn therefrom must be resolved in favor of defendants. See, *Nielsen v. Richman* (C. C. A. 8-1940), 114 Fed. (2d) 343, and other cases cited in the appendix hereto.

Appellee discusses the evidence as though the cases were heard on the merits in the court below and findings made adverse to appellants. Had this been done, appellee would have been entitled to rely on the evidence which supported the findings and every reasonable inference to be drawn therefrom. The sole question here, however, is whether the proffered evidence tends to make a *prima facie* case. Contrary to the rule stated in the *Nielsen* case and other cases cited on this point in the appendix, appellee bases its argument largely on erroneous inferences *against* defendants.

We have pointed out some instances of false inferences in Appellee's Supplemental Brief. Space does not permit of our pointing out all. Concluding the discussion of the evidence, suffice it to say that other arguments advanced by appellee are either in answer to assumed contentions which we have not made, or are answered in our previous briefs.

III.

Applicable Legal Principles Relating to Appellants' Claim of Discrimination.

This point is covered in our Supplemental Brief and the Government advances nothing which requires further discussion.

On page 28 of Appellee's Supplemental Brief it is said: "The lemon order applies the equitable principle that all handlers shall share in the burden of any surplus lemon crop. It has sought to distribute that burden evenly." From what has been said under Points I and II herein, it clearly appears that the reverse is true. The lemon order does not apply the equitable principle referred to, and it has neither sought to, nor does it in fact, distribute the burden evenly.

IV.

The District Court Erred in Excluding Proffered Evidence.

Appellee refers to cases arising under the Emergency Price Control Act (Appellee's Supp. Br. p. 30 *et seq.*). In this connection see *Scripps-Howard Radio v. Federal Communications Commission*, from which we quote in the appendix. See, also, quotation in the appendix from the report of the Attorney General's Committee on Administrative Procedure (1941).

Appellee refers to the federal order regulating the handling of *oranges* (Appellee's Supp. Br. p. 29). While the orange order is generally similar to the lemon order, the method prescribed for arriving at allotments is dif-

ferent and there is no such discrimination under the orange order as exists with respect to lemons, because there are no problems as between tree-ripes and greens in the orange industry.

Assuming, without admitting, that difficult problems of administration would exist if a differential in lemons were allowed as between tree-ripes and greens, yet those difficulties, if in fact there are any, do not justify an unreasonable and inequitable order, or discrimination which deprives producers and handlers of tree-ripes of their property in violation of the Fifth Amendment. In this connection the following from the opinion of Chief Justice Hughes for the court, in *Borden's Farm Products Co. v. Baldwin*,⁴² is in point:

“Respondents’ counsel, referring to the difficulties of price regulation, say that ‘Apparently the fixing of prices by Government discovered as many troubles as were loosed from Pandora’s box.’ This complexity of problems, however, makes it the more imperative that the court in discharging its duty, in sustaining governmental authority within its sphere and in enforcing individual rights, shall not proceed upon false assumptions.”

We find nothing further on this point in Appellee’s Supplemental Brief which is not covered by our Supplemental Brief.

⁴²293 U. S. 194, 210-211; 55 S. Ct. 187; 79 L. Ed. 281-289.

Conclusion.

The judgments in these cases should be reversed and the cases remanded to the District Court with directions to take evidence and make findings of fact in accordance with Rule 52 of the Rules of Civil Procedure.

Respectfully submitted,

GUY RICHARDS CRUMP,

Attorney for Appellants.

APPENDIX.

All Facts That the Evidence Reasonably Tends to Prove and All Inferences That Reasonably May Be Drawn Therefrom Must Be Resolved in Favor of Defendants.

The test is the same as that involved on a motion for directed verdict, or a judgment n.o.v. under Rule 50 of the Federal Rules of Procedure, or a motion for involuntary dismissal under Rule 41 (b) of the same rules. This was expressly held with respect to a motion for directed verdict in *Nielsen v. Richman* (C. C. A. 8—1940), 114 Fed. (2d) 343, 345, where the court says:

“All facts that the plaintiff’s evidence reasonably *tends* to prove, and all inferences that reasonably may be drawn therefrom, must be resolved in her favor.”
(Emphasis added.)

The rule is the same upon a judgment n.o.v. under Rule 50 of the Rules of Federal Procedure. In *Dickerson v. Franklin Nat. Ins. Co. of New York, N. Y.* (C. C. A. 4—1942), 130 Fed. (2d) 35, 37, the court said:

“On motion for directed verdict this evidence was to be taken in the light most favorable to plaintiff and all conflicts were to be resolved in his favor. The motion for directed verdict on this ground was, therefore, properly denied; and the motion for judgment n. o. v. on the same ground stands in no better case. See Rule 50 (b) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 122 F. (2d) 350.”

See also:

Hornin v. Montgomery Ward & Co. (C. C. A. 3),
120 Fed. (2d) 500, 502.

Upon a motion to dismiss under Rule 41 (b) of the Rules of Federal Procedure, the court stated in *Federal Deposit Ins. Corporation v. Mason* (C. C. A. 3), 115 Fed. (2d) 548, 551, that the court

“must view the evidence and all inferences reasonably to be drawn therefrom in the light most favorable to the plaintiff.”

To the same effect see:

Shaw v. Mo. Pac. R. Co. (D. C. Western Dist. La., Monroe Div.), 36 Fed. Sup. 651.

The same rule obtains in California.

Mastrangelo v. West Side U. H. School Dist., 2 Cal. (2d) 540, 544,

where the court stated:

“A non-suit should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment under such circumstances.”

To the same effect, see:

Archer v. City of Los Angeles, 19 Cal. (2d) 19, 23;

Kersten v. Young, 52 Cal. App. (2d) 1, 7;

Turner v. Lischner, 52 Cal. App. (2d) 273, 278.

Additional Authorities on Point IV.

In *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 16-17; 62 Sup. Ct. 875; 86 L. Ed. 1229, 1237-1238, Mr. Justice Frankfurter, speaking for the court, said:

“Judged by its own terms, its history, and the practice under it, the Communications Act of 1934 affords no warrant for depriving the Court of Appeals of the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal challenging its validity. Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments. No such light is shed here. The numerous laws in which Congress has established administrative agencies for the exercise of its regulatory powers do not disclose any general legislative policy regarding the power to stay administrative orders pending review. Some statutes are wholly silent; some turn a court review into an automatic stay; some provide that the commencement of a suit shall not operate as a stay unless the court specifically so provides; some authorize the reviewing court to grant a stay where necessary. Significantly, the recent Emergency Price Control Act of (January 30) 1942 (56 Stat. at L. 23, chap. 26, 50 USCA Appx. Secs. 901 *et seq.*) explicitly denies the power of the reviewing court to enjoin enforcement of the administrative orders.

The various enactments in which the staying power is made explicit, as well as the statutes that are silent about it, afford debating points but no reliable aids in construing the Act before us. One thing is clear. Where Congress wished to deprive the courts of this

historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war.

We conclude that Congress by Sec. 402(b) of the Communications Act of 1934 has not deprived the Court of Appeals of the power to stay— a power as old as the judicial system of the nation. We do not of course go beyond the question put to us. We merely recognize the existence of the power to grant a stay. We are not concerned here with the criteria which should govern the Court in exercising that power. Nor do we in any way imply that a stay would or would not be warranted upon the showing made by the appellants in this case.”

It will be noted that in this case the Supreme Court points out that the Emergency Price Control Act of 1942 explicitly denies the power of the reviewing court to enjoin enforcement of the administrative orders, and the court holds that in the absence of such explicit denial of power (86 L. Ed. 1234) as part of its traditional equipment for the administration of justice a Federal court can stay the enforcement of a judgment pending the outcome of an appeal. “The search for significance in the silence of Congress”, the court says (86 L. E. at p. 1235) “is too often the pursuit of a mirage. * * * * denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts.”

The *Scripps-Howard* case was before the Supreme Court on certificate from the United States Court of Ap-

peals for the District of Columbia for opinion on the question whether an order of the Federal Communications Commission could be stayed pending determination of an appeal therefrom. This case supports what was said on page 5 of Appellants' Reply Brief with respect to cases cited on page 16 of Appellee's Brief.

In its Report of Administrative Procedure in Government Agencies (Document No. 8, 77th Congress, First Session) the Attorney General's Committee on Administrative Procedure, in discussing enforcement proceedings, says that administrative orders become effectively binding only when judicially enforced and a prerequisite condition of judicial enforcement is the court's determination that the order was properly made within the scope of the agency's legal authority. In other words, before enforcing an administrative order, it is essential that the court first determine that the order was within the scope of the agency's legal authority. We quote from page 82 of the report published by the United States Government Printing Office in 1941:

"Statutes creating administrative tribunals generally provide methods by which their determination may be judicially reviewed. In this way, a number of methods have been established: First is the case in which the administrative order is not self-operative and suit for enforcement must be brought by the agency. For example, prior to 1906, no sanction was provided for securing obedience to orders of the Interstate Commerce Commission other than a suit by

the Commission to compel obedience. The same was true of the Federal Trade Commission Act until 1938 and is true today of the National Labor Relations Act. The statutes differ as to the weight to be attached to the administrative findings, the courts in which enforcement is to be sought and the process by which judicial aid is to be invoked. These matters will be discussed below. *The point here is that by this method, administrative orders become effectively binding only when judicially enforced and a prerequisite condition of judicial enforcement is the court's determination that the order was properly made within the scope of the agency's legal authority.*" (Emphasis ours.)

No. 10324

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

VS.

CHINOOK INVESTMENT COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JAN 9 - 1943

PAUL P. O'BRIEN,
CLERK

No. 10324

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon
July Term, 1941

Be It Remembered, That on the 18th day of September, 1941, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint in words and figures as follows, to wit: [1*]

In the District Court of the United States
for the District of Oregon
No. Civil 854

CHINOOK INVESTMENT COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the Plaintiff and for its first cause of action against the defendant alleges as follows:

I.

That at all times mentioned herein, the Plaintiff, Chinook Investment Company, was a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office in the City of Portland, in the County of Multnomah, in the said State.

*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

That Defendant, United States of America, is a sovereign State, free and independent.

III.

On or before March 15, 1937, Plaintiff executed and filed with the Collector of Internal Revenue, for the District of Oregon, an income tax return for the year 1936, and paid the tax of \$4,071.89 thereon, erroneously shown due in four equal installments, on March 15, June 15, September 15 and December 15, 1937.

IV.

That subsequently thereto, on or about June 29, 1939, Plaintiff filed claim for refund of the said sum with interest, which claim was disallowed on September 20, 1939, by the Internal Revenue Commissioner.

V.

That Plaintiff's gross income for the taxable year 1936 was as follows:

Rents	\$11,728.21
Dividends	27,145.09
	[2]
Loss on sale of stock and bonds.....	43,535.02
Gross Income Loss for Year.....	\$ 4,661.72

VI.

That plaintiff's allowable deductions for the taxable year aggregated \$14,331.45, making a total net loss of \$19,493.17.

VII.

That plaintiff's surplus was reduced in the said taxable year from \$252,644.95 to \$225,709.31 as a result of its operations, a reduction of \$26,935.64.

VIII.

That the Commissioner of Internal Revenue erroneously took into account only \$2,000.00 of the losses incurred by plaintiff from the sale of bonds in the taxable year 1936, and erroneously computed an undistributed profits tax of \$4,071.89, and erroneously assessed the same against plaintiff, although plaintiff had no profits in said taxable year, distributed or otherwise, but, on the contrary, suffered a loss as set forth above.

IX.

That losses on sales of stocks and bonds are deductible in determining net income of the plaintiff, in that Section 117 of the Revenue Act, fixing a limitation of \$2,000.00, is inapplicable to a corporation or this plaintiff, and is not a limitation on Section 14 of the Revenue Act of 1936, imposing surtax on undistributed profits.

X.

That the provisions of Section 14 of the Revenue Act of 1936 violate the Fifth Amendment to the Constitution of the United States in that it sets up an arbitrary basis of incidence as applied to the plaintiff by taxing as undistributed net income an amount which is actually nonexistent as income of any character whatever.

XI.

That the provisions of Section 14 of the Revenue Act of 1936 violate Article 9 of the Constitution of the United States in that they impose a tax, not on the [3] receipt of net income, but on its nondisposition, thus constituting a direct tax, without apportionment, on the unspent portion of corporate money.

XII.

That the provisions of Section 14 of the Revenue Act of 1936 violate the Tenth Amendment to the Constitution of the United States in that they attempt to regulate the internal affairs of corporations created by the States and constitute the exercise of powers not delegated to Congress.

(II.) .

And plaintiff, for its second cause of action against the defendant, alleges as follows:

XIII.

Plaintiff realleges the matters and things in Paragraphs I and II above set out and incorporates the same by reference in this its second cause of action.

XIV.

That on or before March 15, 1938, plaintiff executed and filed with the Collector of Internal Revenue for the District of Oregon an income tax return for the year 1937 and paid the tax of \$363.62 erroneously shown due thereon.

XV.

That the Commissioner of Internal Revenue thereafter assessed a deficiency in the sum of \$4,908.06 for the said taxable year against plaintiff, and plaintiff on or about December 2, 1939, paid the same together with interest thereon in the sum of \$508.36, a total of \$5,416.42.

XVI.

That subsequently thereto on or about March 15, 1940, plaintiff filed claim for refund of the sum of \$5,271.68 of the said sum, plus interest, and the said claim was disallowed on or about April 1, 1941, by the Collector of Internal Revenue.

XVII.

That plaintiff's gross income for the taxable year 1937 was as follows:

Interest	\$ 180.00
Rents	18,418.91
	[4]
Dividends	25,188.70
Loss on sale of bonds.....	(20,652.79)
	<hr/>
Gross Income	\$23,134.82

XVIII.

That plaintiff's surplus was reduced in the said taxable year 1937 aggregated \$22,041.33 and plaintiff was entitled to a dividends-received credit of \$21,557.01.

XIX.

That plaintiff's surplus was reduced in the said taxable year from \$225,709.31 to \$208,899.19, a reduction of \$16,810.12, as a result of its operations.

XX.

That the Commissioner of Internal Revenue erroneously took into account only \$2,000.00 of the losses incurred by Plaintiff from the sale of bonds in the taxable year 1937, and erroneously computed an Undistributed Profits tax of \$1,086.60, and erroneously assessed the same against plaintiff, although plaintiff had no profits subject to taxation in the said taxable year, distributed or otherwise.

XXI.

That the Commissioner of Internal Revenue erroneously took into account only \$2,000.00 of the losses incurred by plaintiff from the sale of bonds in the taxable year 1937 and erroneously computed a personal holding company tax, and erroneously assessed the same against plaintiff, although plaintiff had no taxable income in the said taxable year and was not a personal holding company for the reason that rents constituted more than 50 per cent of its gross income.

XXII.

That plaintiff realleges the matters and things in Paragraphs IX, X, XI and XII of this its complaint, and incorporates the same by reference in this, its second cause of action.

XXIII.

That no part of the aforesaid taxes for the taxable years 1936 and 1937, or the interest thereon, has been refunded to plaintiff, but the said taxes and interest are wrongfully withheld from plaintiff. [5]

XXIV.

That the amount involved in this controversy does not exceed the sum or value of \$10,000.00.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$9,343.57, together with interest thereon at the rate of 6 per cent per annum from the dates of payment, for plaintiff's costs and disbursements herein, and for such other or further relief as is just and equitable to be awarded to plaintiff in this proceeding.

ROBT. T. JACOB,

Attorney for Plaintiff

917 Public Service Building

Portland, Oregon

ATwater 9401

State of Oregon,

County of Multnomah—ss.

I, Robert S. Farrell, being first duly sworn, depose and say that I am the President of the Chinook Investment Company, plaintiff in the above entitled cause; and that the foregoing complaint is true as I verily believe.

ROBERT S. FARRELL

Subscribed and sworn to before me this 18th day of September, 1941.

[Seal]

RENEE FRITSCH

Notary Public for Oregon.

My Commission expires 2/5/45.

[Endorsed]: Filed September 18, 1941. [6]

And Afterwards, to wit, on the 29th day of December, 1941, there was duly Filed in said Court, an Answer, in words and figures as follows, to wit: [7]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant by Carl C. Donough, United States Attorney, and C. Laird McKenna, Assistant United States Attorney for the District of Oregon, its attorneys, and in answer to plaintiff's complaint filed in the above-entitled action, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs I, II, IV, XV and XXIV of the complaint.

II.

Admits the allegations of paragraph III of the complaint except the dates therein. Admits, however, that plaintiff's 1936 return was filed on March 1, 1937, and that the installments of tax alleged were paid on March 18, June 12, September 14, and December 3, 1937, respectively.

III.

Denies the allegations of paragraph V of the complaint. Admits, however, that plaintiff reported on its 1936 Corporation Income and Excess Profits Tax Return (Form 1120) income from rents of \$11,725.21 and from dividends of \$27,145.09 as alleged, and that it reported a capital net [8] loss of \$38,-

487.49, alleged to have been sustained on the sale of Chinook Investment Company stocks and bonds, of which amount it deducted \$2,000, pursuant to the provisions of Section 117 (d) of the Revenue Act of 1936.

IV.

Denies the allegations of paragraph VI of the complaint. Admits, however, that plaintiffs reported and claimed total deductions of \$14,331.45 claimed for the year 1936.

V.

Denies the allegations of paragraph VII of the complaint. Admits, however, that plaintiffs reported a surplus of \$232,644.95 for the year 1936.

VI.

Denies the allegations of paragraphs VIII, IX, X, XI, and XII of the complaint.

VII.

Since paragraph XIII of the complaint realleges all matters and things in paragraphs I and II of the said complaint and incorporates the same in the complaint by way of its second cause of action in this proceeding, defendant admits the allegations thus incorporated therein similarly as paragraphs I and II thereof are admitted as above indicated.

VIII.

Admits the allegations of paragraph XIV of the complaint except that it is denied that the amount shown due thereon was erroneously paid as alleged.

IX.

Denies the allegations of paragraph XVI of the complaint. Admits, however, that plaintiffs filed refund [9] claims for the year 1937, which were rejected as follows:

Date Filed	Date Rejected
February 27, 1939	March 16, 1940
June 30, 1939	March 16, 1940
September 24, 1940	April 1, 1941

X.

Denies the allegations of paragraph XVII of the complaint. Admits, however, that plaintiffs reported for the year 1937 income of \$180 from interest, \$18,418.91 from rent, \$25,188.70 from dividends, and capital net loss of \$20,652.79, of which it deducted \$2,000, pursuant to the provisions of Section 117 (d) of the Revenue Act of 1936.

XI.

Denies the allegations of paragraphs XVIII, XIX, XX, XXI and XXII of the complaint.

XII.

Admits the allegations of paragraph XXIII of the complaint, except that it is denied that the taxes and interest are wrongfully withheld as alleged.

XIII.

Denies the concluding paragraph of the complaint and that plaintiffs are entitled to the relief prayed for.

Wherefore, it is prayed that the complaint be dismissed with costs to plaintiffs.

CARL C. DONAUGH

United States Attorney.

C. LAIRD McKENNA

Assistant United States
Attorney

Address: 506 U. S. Court
House, Portland, Oregon.

[Endorsed]: Filed December 29, 1941. [10]

And Afterwards, to wit, on Tuesday, the 17th day of February, 1942, the same being the 90th Judicial day of the Regular November, 1941, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [11]

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause having duly come on for pretrial before the undersigned Judge of the above entitled Court on the 17th day of February, 1942, the plaintiff appeared herein in person and by Robert T. Jacob and S. J. Bischoff, his attorneys; defendant appeared herein by Thomas R. Winter, its attorney; whereupon plaintiff moved the Court for leave to amend the Complaint by interlineation in the following respects, to-wit: By inserting in Line 2 of

Paragraph XX between the word "of" and "bonds" the words "stocks and". In Paragraph XX line 3 the figure "\$1086.60" should be changed to read "\$4908.06". In Paragraph XI the words "Article 9 of" to be changed to read "Sixteenth Amendment to".

No objection was interposed to said motion, and it is

Ordered that the motion be and the same hereby is granted; leave is hereby granted to make the said changes by interlineation, and it is further

Ordered that said allegations be deemed denied.

Thereafter counsel for both sides made their statements as to the character of the issues of law and fact involved and the issues were stated to be as follows:

Defendant asserts and contends that there is no issue of fact involved in the case; that the figures set forth in the income tax [12] returns for the years 1936 and 1937 are correct and have not been challenged; and that there is only one issue of law involved in both causes of action, to-wit: that plaintiff was not entitled to deduct the whole of the losses sustained in the years 1936 and 1937 resulting from the sale of securities in those years, because the securities were capital assets and deduction is limited to \$2,000 under Section 117(d) of the Revenue Act of 1936.

Plaintiff contends that the securities sold in the years 1936 and 1937 were not "capital assets" but that plaintiff bought and sold stocks in the ordi-

nary course of business as a regular trade and business, and that the limitation of Section 117(d) does not apply; that it was entitled to deduct the full amount of loss sustained in both years in determining the existence of undistributed profits or income in those years; that even though the securities be deemed "capital assets" that it was entitled nevertheless to deduct the total loss because the term "undistributed profits" must be used in the sense of earnings or profits as the term is used in Section 115 of the Internal Revenue Act defining dividends; that in determining the existence of net profits there must also be deducted the dividends received credit under Section 26(b) of the Internal Revenue Act; that it was not a personal holding company in the year 1937 because the rent exceeded 50% of gross income in that year; and if the undistributed profits tax act and the personal holding company tax act are not construed and applied so as to permit the deduction of the entire loss sustained, the acts are unconstitutional because they do not provide for tax on the receipt of income, but provide a penalty for failure to distribute income even though there be no undistributed profits in fact, and on the further ground that the acts as so construed and applied are grossly arbitrary and unreasonable.

It is therefore,

Ordered that the issues of law and fact for determination be deemed settled as aforesaid. [13]

Thereafter plaintiff and defendant introduced in evidence the following exhibits and no objections

were interposed except where objection is specifically noted herein:

Plaintiff's Exhibit 1:

Certified copy of Income Tax Return of plaintiff for year 1936.

Plaintiff's Exhibit 2:

Certified copy of letter dated March 2nd, 1937, addressed to Chinook Investment Company.

Plaintiff's Exhibit 3:

Certified copy of claim for refund of \$4,071.89, received by Collector February 18, 1938.

Plaintiff's Exhibit 4:

Certified copy of Amended Claim for Refund of \$4,071.89, received by Collector June 30, 1939, with letter dated September 20, 1939, addressed to Chinook Investment Company, disallowing the claim.

Plaintiff's Exhibit 5:

Certified copy of Income Tax and Excess Profits Tax Return for 1937, filed by Chinook Investment Company.

Plaintiff's Exhibit 6:

Certified copy of Return on Personal Holding Company *from* for year 1937, of Chinook Investment Company.

Plaintiff's Exhibit 7:

Certified copy of Internal Revenue Agent's Report dated April 20, 1939.

(Mr. Winter: We want to object to this because it is irrelevant and immaterial, not the

best evidence; and further object to Exhibit 7 in that it appears there is a lot of pencil notations on it we know nothing about, and under-scorings and pencil notations and other marks.

Mr. Bischoff: In this respect we ask leave of Court to erase the lead pencil notations appearing thereon and they are not to be deemed a part of the document.)

Plaintiff's Exhibit 8:

Certified copy of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax for 1937.

Plaintiff's Exhibit 9:

Certified copy of Claim for Refund of \$363.62, received by Collector February 27, 1939.

Plaintiff's Exhibit 10:

Certified copy of letter dated March 16, 1940, to Chinook Investment Company from Guy T. Helvering, Commissioner.

Plaintiff's Exhibit 11:

Certified copy of Amended Claim for Refund of \$363.62 with interest, received by Collector June 30, 1939.

Plaintiff's Exhibit 12:

Certified copy of Amended Claim for Refund of \$5,271.68, with copy of letter dated April 1st, 1941, to Chinook Investment Company from Guy T. Helvering, Commissioner. [14]

Plaintiff's Exhibit 13:

Certified copy of Articles of Incorporation of Chinook Investment Co.

(Mr. Winter: We will object to it as irrelevant and immaterial, not within any issue in this case; no allegation as to—nothing in the complaint or pleadings, or in the claim for refund, on which suit is based, as to the existence of the corporation, and there is no issue as to the business which the corporation was engaged in, it being our position that the intent to form a personal holding corporation is immaterial, because when the two conditions are present it is a personal holding corporation regardless of the intent of the incorporators.)

Plaintiff's Exhibit 14:

Bundle of invoices of purchases and sales of Stock by Plaintiff.

(Mr. Winter: We object to them, first, as not being properly identified; second, as being within no issues in this case, irrelevant and immaterial, the return for the year 1936, Pre-trial Exhibit 1, showing, under Schedule B, Capital Gains and Losses from sales or exchanges only, the date acquired—first, Description of Property; date acquired—when I said “description of Property”, I mean the description of the stocks and/or bonds; date sold; gross sales price or contract price; cost; and amount of gain or loss; and there is no issue in the pleadings with respect to the amounts

thereof, nor as to the reporting of them as capital losses, and no claims for refund filed or contention theretofore made, either in the claim for refund or complaint, that they were other than capital losses as so reported. Were there a number of years in addition to the years here in question?

Mr. Bischoff: For a series of years, preceding and succeeding the two years in question.

Mr. Winter: We further object on the grounds that they are not in any issue in this case, appear to be transactions preceding and succeeding the years here involved.)

Plaintiff's Exhibit 14-a:

Bundle of invoices of purchases and sales of stock for year 1936.

Plaintiff's Exhibit 14-b:

Bundle of invoices of purchases and sales of stock for the year 1937.

(Mr. Winter: The same objection, heretofore made to Exhibit 14 in toto—irrelevant, immaterial, not within the issues of this case. I want to further object to Pre-Trial Exhibits, particularly Exhibits 14-A and 14-B, on the grounds that they are not properly identified, and appear on their face to be sales invoices, purchases—sales invoices for purchase of shares of stock by the plaintiff corporation for the years involved, and do not disclose, nor controvert the item set forth as gain or loss on the sale—capital gain or losses from the sale or

exchange of stock set forth in the 1936 and 1937 income tax returns filed herein.) [15]

Defendant's Exhibit 15:

Certified copy of letter dated November 28, 1939, to Chinook Investment Company from J. W. Maloney, Collector, in re deficiency in income tax for 1937, amounting to \$722.98.

(Mr. Bischoff: Objected to as immaterial, irrelevant and incompetent, and that the amount referred to in this Exhibit is not in any way involved in this case.)

Defendant's Exhibit 16:

Certified copy of letter dated November 28, 1939 to Chinook Investment Company from J. W. Maloney, Collector, in re deficiency in income tax for 1937 amounting to \$4,185.08.

Dated as of the 17th day of February, 1942.

CLAUDE McCOLLOCH,

Judge.

Copy received 3/13/42.

[Endorsed]: Filed June 9, 1942. [16]

And Afterwards, to wit, on the 9th day of June, 1942, there was duly Filed in said Court, an Opinion, in words and figures as follows, to wit: [17]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

I feel that Section 117 (b) should be given a broader interpretation than counsel for defendant concedes, and, since Mr. Farrell's testimony is undisputed that he kept the securities account active by buying and selling, I must hold that the securities were not capital assets within the meaning of the statute and the pertinent regulations.

Even though it be felt that the claim for refund was not broad enough to raise the question whether the securities involved were capital assets, defendant's authorities do not support the proposition that such question cannot be raised in a subsequent suit for recovery.

Since there was full discussion at the pre-trial hearing of plaintiff's intention to rely on the point that the securities sold at a loss were not capital assets, the complaint may be amended to raise this question more specifically, if plaintiff's attorneys deem that such amendment is necessary.

Dated June 9, 1942.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 9, 1942. [18]

And Afterwards, to wit, on the 16th day of June, 1942, there was duly Filed in said Court, and entered upon the record of said Court, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before this Court sitting without a jury, the Plaintiff appeared herein in person and by Robt. T. Jacob and S. J. Bischoff, its attorneys; the Defendant appeared herein by Carl C. Donagh and Thomas R. Winter, its attorneys; the pleadings and proofs of the parties were duly heard and considered, the cause was taken under advisement and the Court being now advised in the premises, does hereby make and file herein its

FINDINGS OF FACT

I.

That at all of the times herein mentioned, the Plaintiff, Chinook Investment Company, was a corporation organized and existing for profit, under and by virtue of the laws of the State of Oregon, with its principal office in the City of Portland, in the County of Multnomah, State of Oregon; that Plaintiff was during all of the times herein mentioned a citizen and resident of the State of Oregon; that its charter provisions contain the following:

“1. To own, buy, sell or to acquire by sale, trade or exchange, bonds, notes, mortgages and other evidences of indebtedness or shares of stock in other corporations, and to exercise while the owner thereof all the rights, powers and privileges, including the right to vote thereon, that a natural person being owner thereof might, could or would exercise, negotiate loans and transact any other business usually transacted by a credit or finance company.” [20]

II.

That Defendant, United States of America, is a sovereign State, free and independent.

III.

That the amount in controversy herein is in excess of the sum of \$3,000.00 but does not exceed the sum of \$10,000.00.

IV.

That on March 1st, 1937, Plaintiff executed and filed with the Collector of Internal Revenue for the District of Oregon, an Income Tax Return for the calendar year 1936, showing no taxable income; that thereafter, to-wit: on March 2, 1937, the Collector of Internal Revenue for said District, on his own Motion, made an assessment against the Plaintiff for said calendar year of \$4,071.89, “surtax on undistributed profits”; that Plaintiff paid the tax so assessed as follows:

Date Paid	Amount
March 18, 1937.....	\$1,018.00
June 12, 1937.....	1,018.00
Sept. 14, 1937.....	1,018.00
Dec. 3, 1937.....	1,017.89
Total.....	<hr/> \$4,071.89

V.

That on June 29, 1939, Plaintiff filed with the Collector of Internal Revenue for the District of Oregon a Claim for Refund of the sum paid as aforesaid, which Claim was disallowed by the Commissioner of Internal Revenue on September 20, 1939.

VI.

That on or before March 15, 1938, Plaintiff executed and filed with the Collector of Internal Revenue for the District of Oregon, an Income Tax Return for the calendar year 1937, which Return as executed and filed disclosed a tax liability of \$363.62 as undistributed profits surtax, which Plaintiff paid to the Collector of Internal Revenue at the time of filing said Return. [21]

VII.

That thereafter the Return of the Plaintiff for the calendar year 1937 was examined by an agent of the Internal Revenue Department and as a result thereof an additional assessment of \$5,271.68, together with interest, making a total assessment of \$5,417.42 was made by the Commissioner of Internal Revenue, representing a Personal Holding Company tax on undistributed profits, and said Commis-

sioner required Plaintiff to execute and file an Amended Personal Holding Company Return upon the figures computed by the said Revenue Agent. That Plaintiff protested the liability for the said additional assessment, but to avoid imposition of penalty, executed the said Amended Personal Holding Company Return and filed the same, accompanied by a letter which was attached thereto, in words and figures as follows:

“A return on Form 1120 was prepared and filed and failure to file the Form 1120P for Personal Holding Companies was due to the fact that it was the contention of the taxpayer that it was not a Holding Company and hence not required to file Form 1120P. The returns of the taxpayer had been examined for the year 1936 and the company declared not to be a Personal Holding Company, and the officers believed that the status of the Company had not changed as to the year 1937. The return herewith submitted is submitted at the request of the Internal Revenue Agent and the signing and submission thereof is made with the specific reservation that it is not an admission of affiant's liability as a Personal Holding Corporation, but is made for the purpose of avoiding litigation, if possible, and in the hope that an equitable determination of the taxpayer's status may be made without the necessity of legal action. The right to later contest the va-

lidity of the assessment as a personal holding company is specifically reserved.

CHINOOK INVESTMENT
COMPANY,

By ROBERT S. FARRELL,
President.

Subscribed and sworn to before me this 15
day of November, 1939.''

VIII.

That by reason of said Internal Revenue Agent's report and the assessment made thereon, Plaintiff paid the said sum of \$5,417.42, which together with the aforesaid sum of \$363.62 made a total of \$5,781.04 paid by Plaintiff at the following times:

[22]

Date Paid	Amount
March 9, 1938.....	\$ 90.91
June 13, 1938.....	90.91
Sept. 16, 1938.....	90.90
Dec. 15, 1938.....	90.90
Dec. 13, 1939	
Tax and Interest.....	5,417.42
Total	<hr/> \$5,781.04

IX.

That on February 27, 1937, Plaintiff filed with the Collector of Internal Revenue for the District of Oregon its Claim for Refund in the sum of \$363.62, paid as aforesaid; that on June 30, 1939, Plaintiff filed with said Collector of Internal Revenue an Amended Claim for Refund of \$363.62 and on September 24, 1940, Plaintiff filed an Amended Claim for Refund for the additional sum of

\$5,271.68 with the said Collector of Internal Revenue.

That the Claim for Refund filed February 27, 1939, was rejected March 16, 1940; that the Amended Claim for Refund filed June 30, 1939, was rejected on March 16, 1940, and the Amended Claim for Refund filed September 24, 1940, was rejected April 1, 1941.

X.

That Plaintiff's gross receipts and deductions for the calendar year 1936 were as follows:

Gross Receipts	
Rents	\$11,728.21
Dividends	27,145.09
Total.....	38,873.30
Deductions	
Salaries	1,200.00
Repairs	82.01
Interest	3,200.00
Taxes	5,050.56
Depreciation	4,300.28
Insurance	67.41
Expenses	403.47
Total.....	14,331.45
Dividend received Credit (85% of \$27,145.09) ..	23,073.32
Loss from sale of Securities.....	40,035.02
Plaintiff's Surplus Account was reduced in 1936 by the sum of.....	\$26,935.64
	[23]

XI.

That the Plaintiff's gross receipts and deductions for the calendar year 1937 were as follows:

Gross Receipts

Interest	\$ 180.00
Rent	18,418.91
Dividends	25,188.70
Total.....	43,787.61

Deductions

Repairs	1,774.72
Interest	8,726.37
Taxes	9,829.72
Depreciation	5,212.87
Expenses	1,134.33

Total.....	26,674.11
Dividends received Credit (85% of \$25,188.70)..	21,410.49
Loss from sale of Securities.....	20,652.79
Plaintiff's Surplus Account was reduced during the calendar year 1937 by the sum of.....	16,810.12

XII.

That during the calendar years 1936 and 1937 the Plaintiff corporation engaged in the business of buying and selling stocks and bonds to and from customers in the ordinary course of its trade or business, and maintained offices and facilities for carrying on said business.

That the stocks and bonds held by it during the said calendar years were held by it primarily for sale to customers in the ordinary course of its trade or business, and not for investment or speculation, and the securities bought and sold by Plaintiff during each of said calendar years resulting in the losses sustained, were held, dealt in and sold in the manner herein set forth.

XIII.

That during said period of time Plaintiff bought and sold stocks and bonds for its own account for

cash, and not on margin; that it bought and sold stocks and bonds at private sales; selling securities to individuals desiring [24] to buy the same and purchasing securities from individuals desiring to sell the same; that Plaintiff also purchased and sold securities in what are known as "over the counter" transactions, that is, purchases and sales outright to and from private dealers in securities, and also bought and sold some securities through brokers in the market. It bought and sold stocks and bonds in corporations in the management and affairs of which Plaintiff, by its President, took part.

XIV.

That the President of Plaintiff kept in very close touch with the market and kept Plaintiff's cash on hand and moneys that it had borrowed moving all the time in the business of buying and selling securities, purchasing from \$200,000.00 to \$300,000.00 worth per year, and selling a like amount in each year.

That the purchases and sales were made in varying quantities and amounts, ranging from a few shares at low prices to large blocks of stock at higher prices. Such purchases and sales were not made intermittently or occasionally, but were carried on as a regular business during each of said years.

XV.

That Plaintiff did not make any net profit during the calendar years 1936 and 1937, but, on the contrary, sustained net losses in both of the said calen-

dar years, and Plaintiff had no undistributed profits in either year.

XVI.

That the time of the pre-trial [25] proceedings held herein, the Plaintiff stated its position and contention that the said securities bought and sold as aforesaid were not capital assets; that the Defendant did not at said time claim any surprise by reason of said Plaintiff's contention and did not move for any continuance by reason thereof; that the pre-trial Order tendered by Defendant did not challenge the fact that the issue was before the Court; and the pretrial order signed stated this issue that thereafter the issue of fact as to whether the said securities bought and sold as aforesaid were capital assets was tried to the Court; that Defendant did not at any time during the trial of the action claim surprise by reason of Plaintiff's contention that the said securities were not capital assets; that Defendant did not in the Brief submitted to the Court claim surprise by Plaintiff's said contention; that Defendant first asserted the contention after Briefs were exchanged and the case was finally argued.

Upon the foregoing Findings of Fact, the Court now makes and files herein its

CONCLUSIONS OF LAW

I.

That this Action is properly brought under the Tucker Act, and the Court has jurisdiction of the subject matter and the parties.

II.

That the Securities sold by Plaintiff during the Calendar years 1936 and 1937 resulting in the losses as set forth in the Findings of Fact herein were not capital assets within the meaning of Section 117 of the Revenue Act of 1936 and the Regulations promulgated in connection therewith, and that Plaintiff is therefore entitled to deduct the whole amount of the losses sustained by reason of the sale of said securities in said years, and was not limited to a deduction of \$2,000.00 only in either of the said years. [26]

III.

That by reason of the deduction of the losses sustained as aforesaid in both of the said calendar years, Plaintiff had no undistributed profits which became subject to taxation under the Revenue Act of 1936 for the year 1936, or subject to taxation under the Personal Holding provisions of the Act in force during the year 1937.

IV.

That the assessments made by the Commissioner of Internal Revenue for the calendar years 1936 and 1937 were erroneous and the taxes paid by Plaintiff by reason of said assessments were erroneously paid and received by the Collector of Internal Revenue, and by reason thereof Plaintiff is entitled to recover from the Defendant the sum of \$4,071.89 on its first cause of action; and that Plain-

tiff is entitled to recover from the Defendant the sum of \$5,781.04 on its second cause of action.

V.

The Complaint may be deemed amended by interlining in the third line of Paragraph IX thereof after the word Plaintiff, the following:

“because the loss did not result from sales of capital assets.”

and by interlining in Paragraph XX thereof in the third line, after the figure 1937, the words:

“because the loss did not result from the sale of capital assets.” [27]

That Plaintiff is entitled to the entry of Judgment in its favor as herein set forth, together with its costs and disbursements incurred herein as taxed by the Clerk of the Court.

Exception to foregoing requested and allowed to defendant June 16, 1942.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed June 18, 1942. [28]

And Afterwards, to wit, on Tuesday, the 16th day of June, 1942, the same being the 91st Judicial day of the Regular March, 1942, Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [29]

In the District Court of the United States
For the District of Oregon

Civil Action No. 854

CHINOOK INVESTMENT COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause having come on for trial upon the issues formed by the pleadings filed herein, the Plaintiff appearing in person and by Robt. T. Jacob and S. J. Bischoff, its attorneys, the Defendant appearing herein by Carl C. Donough and Thomas R. Winter, its attorneys, the pleadings and proofs of the parties herein having been duly heard and considered, the cause was taken under advisement. Thereafter, the Court duly made and filed its Memorandum of Decision, Findings of Fact and Conclusions of Law.

Now on Motion of Robt T. Jacob and S. J. Bischoff, attorneys for Plaintiff, it is

Ordered, Adjudged and Decreed that Plaintiff, Chinook Investment Company, a corporation, do have judgment for and recover of and from the Defendant, United States of America, the sum of \$4,071.89 upon the first cause of action set forth in the Complaint, and the sum of \$5,781.04 upon the second cause of action set forth in the Complaint, together with Plaintiff's costs and disbursements

in the sum of \$65.50 as taxed by the Clerk of this Court.

Dated this 16th day of June, 1942.

(s) CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed June 16, 1942. [30]

And Afterwards, to wit, on the 14th day of September, 1942, there was duly Filed in said Court, a Notice of Appeal, in words and figures as follows, to wit: [31]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final Judgment dated the 16th day of June, 1942, and filed in the above-entitled court on the 18th day of June, 1942.

Dated this 14th day of September, 1942.

CARL C. DONAUGH,

United States Attorney.

JAMES H. HAZLETT,

Assistant United States Attorney.

THOMAS R. WINTER,

Special Assistant to the
United States Attorney.

[Endorsed]: Filed September 14, 1942. [32]

And Afterwards, to wit, on the 19th day of September, 1942, there was duly Filed in said Court, Appellant's statement of points, in words and figures as follows, to wit: [33]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellant, United States of America, will rely upon the following points in the prosecution of its appeal from the Judgment in the United States District Court for the District of Oregon:

I.

The District Court erred in entering Judgment for the appellee and against the appellant in the sum of \$4,071.89 upon the alleged first cause of action and the sum of \$5,781.07 upon the alleged second cause of action, together with costs and disbursements; conversely, the Court erred in failing and refusing to enter Judgment for the appellant dismissing appellee's alleged causes of action with costs.

II.

The District Court erred in making and entering Findings X and XI in so far as they purport to find that the appellee sustained an ordinary loss on the sale of its securities as distinguished from a capital loss; further, these Findings with respect to dividends received credit and surplus account were in-

competent, immaterial and irrelevant in determining the issues of whether the appellee was subject to surtax on undistributed profits for the year 1936 and subject to surtax as a personal holding company for the year 1937. [34]

III.

The District Court erred in making and entering Findings XII, XIII and XIV because the contents thereof were not supported by the evidence and are contrary to the evidence in so far as they purport to find that the appellee was “in the business of buying and selling stocks and bonds to and from customers in the ordinary course of its trade or business” or that it sustained an “ordinary loss” as distinguished from a “capital loss”; further, the contents thereof were incompetent, immaterial and irrelevant in determining the issues raised by the appellee’s claim for refund and complaint in this suit of whether the Commissioner erroneously refused them to permit the appellee to deduct the entire amount of its “capital loss” in arriving at the amount of net income for the years 1936 and 1937.

IV.

The District Court erred in admitting any testimony or exhibits on the question of whether the appellee sustained “capital losses” as alleged in appellee’s claim for refund and suit in this action as distinguished from “ordinary losses”.

V.

The District Court erred in making and entering Finding XV because the contents thereof were not supported by the evidence and are contrary to the evidence in this suit.

VI.

The District Court erred in overruling the appellant's objections and admitting in evidence the following Exhibits 14, 14-a and 14-b:

Plaintiff's Exhibit 14:

Bundle of invoices of purchases and sales of stock by plaintiff. [35]

“(Mr. Winter: We object to them, first, as not being properly identified; second, as being within no issues in this case, irrelevant and immaterial, the return for the year 1936, Pre-trial Exhibit 1, showing, under Schedule B, Capital Gains and Losses from sales or exchanges only, the date acquired—first, Description of Property; date acquired—when I said “Description of Property”, I mean the description of the stock and/or bonds; date sold, gross sales price or contract price; cost; the amount of gain or loss; and there is no issue in the pleadings with respect to the amounts thereof, nor as to the reporting of them as capital losses, and no claims for refund filed or contention theretofore made, either in the claim for refund or complaint, that they were other than capital losses as so reported. Were there a number of

years in addition to the years here in question?

“Mr. Bischoff: For a series of years, preceding and succeeding the two years in question.

“Mr. Winter: We further object on the grounds that they are not in any issue in this case, appear to be transactions preceding and succeeding the years here involved.)”

Plaintiff's Exhibit 14-a:

Bundle of invoices of purchases and sales of stock for year 1936.

Plaintiff's Exhibit 14-b:

Bundle of invoices of purchases and sales of stock for the year 1937.

“(Mr. Winter: The same objection heretofore made to Exhibit 14 in toto—irrelevant, immaterial, not within the issues of this case. I want to further object to Pre-Trial Exhibits, particularly Exhibits 14-a and 14-b, on the grounds that they are not properly identified, and appear on their face to be sales invoices, purchases—sales invoices for purchase of shares of stock by the plaintiff corporation for the years involved, and do not disclose, nor controvert the item set forth as gain or loss on the sale—capital gain or losses from the sale or exchanges of stock set forth in the 1936 and 1937 income tax returns filed herein.)”

VII.

The District Court erred in making and entering Finding XVI because the contents thereof were not supported by and are contrary to the evidence and record in this suit as shown in Paragraph V, *supra*. [36]

VIII.

The District Court erred in holding (Conclusion of Law II) "That the Securities sold by Plaintiff during the Calendar years 1936 and 1937 resulting in the losses as set forth in the Findings of Fact herein were not capital assets within the meaning of Section 117 of the Revenue Act of 1936 and the Regulations promulgated in connection therewith, and that Plaintiff is therefore entitled to deduct the whole amount of the losses sustained by reason of the sale of said securities in said years, and was not limited to a deduction of \$2,000.00 only in either of the said years."

IX.

The District Court erred in holding (Conclusion of Law III) that the appellee had no undistributed profits which became subject to taxation under Section 14 of the Revenue Act of 1936 for the year 1936 or subject to taxation under Section 351 of the Revenue Act of 1937.

X.

The District Court erred in holding (Conclusion of Law IV) that the assessments made by the Commissioner of Internal Revenue for the calendar

years 1936 and 1937 were erroneous and that under the law and the evidence appellee was entitled to Judgment against appellant.

XI.

The District Court erred in holding (Conclusion of Law V) that the appellee's complaint in this suit may be amended by interlineation thereby alleging a new and different cause of action and on a different ground other than that alleged in the appellee's claim for refund; further, that appellee's claim for refund does not support this suit and the Court was without jurisdiction to enter- [37]tain the causes of action on the grounds upon which the Judgment of the District Court was based.

The United States District Court further erred in holding that under the law and the evidence appellee was entitled to Judgment against appellant.

CARL C. DONAUGH,

United States Attorney.

JAMES H. HAZLETT,

Assistant United States Attorney.

THOMAS R. WINTER,

Special Assistant to the
United States Attorney.

United States of America,
District of Oregon—ss.

Service of the within Statement of Points is accepted in the State and District of Oregon this 19th day of September, 1942, by receiving a copy thereof,

duly certified to as such by James H. Hazlett, Assistant United States Attorney for the District of Oregon.

R. T. JACOB,

Of Attorneys for Plaintiff.

[Endorsed]: Filed September 19, 1942. [38]

And Afterwards, to wit, on the 19th day of September, 1942, there was duly Filed in said Court, a Designation of the contents of the record on appeal, in words and figures as follows, to wit: [39]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above Court:

The defendant, United States of America, hereby designates the following in this case to be contained in the record on appeal:

1. Complaint.
2. Answer.
3. Memorandum of Decision dated June 9, 1942.
4. Findings of Fact and Conclusions of Law.
5. Judgment dated June 16, 1942.
6. Notice of Appeal.
7. Statement of Points.
8. Pre-trial order, dated as of Feb. 17, 1942.
Filed June 9, 1942.

9. Reporter's Original Transcript of Trial Proceedings.

10. All Original Exhibits.

11. This Designation of Contents of Record on Appeal.

CARL C. DONAUGH

United States Attorney

JAMES H. HAZLETT

Assistant United States
Attorney

THOMAS R. WINTER

Special Assistant to the United
States Attorney for the Dis-
trict of Oregon.

[Endorsed]: Filed September 19, 1942. [40]

And Afterwards, to wit, on Saturday, the 19th day of September, 1942, the same being the 65th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [41]

[Title of District Court and Cause.]

ORDER RE EXHIBITS

Upon application of the attorney for defendant and appellant herein and good cause appearing therefor, it is hereby

Ordered that all original exhibits in this cause

be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in connection with the appeal of this case.

Dated this 19th day of September, 1942.

CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed Sept. 19, 1942. [42]

And Afterwards, to wit, on the 7th day of October, 1942, there was duly Filed in said Court, a Stipulation amending designation of contents of record, in words and figures as follows, to wit: [43]

[Title of District Court and Cause.]

STIPULATION TO AMEND "DESIGNATION
OF CONTENTS OF RECORD ON APPEAL"

It is hereby Stipulated that the "Designation of Contents of Record on Appeal" filed by defendant be amended by including therein a line to be inserted between lines 8 and 9, as follows:

"8a. Reporter's original transcript of pre-trial proceedings. Marked Exhibit 17."

Dated October 5, 1942.

S. J. BISCHOFF

Attorney for Plaintiff

THOMAS R. WINTER

[Endorsed]: Filed October 7th, 1942. [44]

Attorney for Defendant.

And Afterwards, to wit, on Tuesday, the 20th day of October, 1942, the same being the 91st Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [45]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
DOCKETING APPEAL

This Matter coming on to be heard on motion to James H. Hazlett, Assistant United States Attorney for the District of Oregon, for an order extending the time for docketing the appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, and the Court being fully advised in the premises, It Is Ordered that the defendant, United States of America, have to and including the 24th day of November, 1942, to docket its appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 20th day of October, 1942.

CLAUDE MCCOLLOCH
District Judge

[Endorsed]: Filed Oct. 20, 1942. [46]

And Afterwards, to wit, on Tuesday, the 24th day of November, 1942, the same being the 21st Judicial day of the Regular November, 1942, Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [47]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
DOCKETING APPEAL

This Matter coming on to be heard on motion of James H. Hazlett, Assistant United States Attorney for the District of Oregon, for an order extending the time for docketing the appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, and the Court being fully advised in the premises, It Is Ordered that the defendant, United States of America, have to and including the 13th day of December, 1942, to docket its appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 24th day of November, 1942.

CLAUDE McCOLLOCH
District Judge

[Endorsed]: Filed Nov. 24, 1942. [48]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 48 inclusive, constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 854, in which Chinook Investment Company is plaintiff and appellee, and United States of America is defendant and appellant; that said transcript has been prepared by me in accordance with the designation and stipulation amending designation of contents of the record on appeal filed therein by appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designation and stipulation amending designation.

I further certify that I am transmitting with said transcript, the duplicate of the reporter's transcript filed in the Clerk's Office.

I further certify that I am transmitting to the Circuit Court of Appeals for the Ninth Circuit, pursuant to an order of the District Court of the

United States for the District of Oregon, all of the original exhibits numbered from 1 to 14-b inclusive and the original transcript of pretrial proceedings marked exhibit 17, and defendant's exhibits 15 and 16, being all of the original exhibits introduced in evidence at the trial in said cause. [49]

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$8.10 for comparing and certifying the within transcript, making a total of \$13.10, which has not been paid by appellant but is a constructive charge against the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 1st day of December, 1942.

[Seal]

G. H. MARSH,
Clerk. [50]

[Title of District Court and Cause.]

Portland, Oregon, Tuesday, February 17, 1942,
2:14 o'clock P. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Messrs. Robert T. Jacob and S. J. Bischoff, Attorneys for the Plaintiff;

Mr. Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, appearing for the United States of America, the Defendant.

TRIAL PROCEEDINGS

Mr. Bischoff: Shall we proceed now with the trial, your Honor?

The Court: Yes.

Mr. Bischoff: At this time I might say first, that we concluded our pre-trial procedure here at twelve o'clock and we haven't had the time to prepare a pre-trial order but we will prepare it and submit it to your Honor.

The Court: Is there any doubt of our having enough time? Could you put your oral testimony on before your documentary?

Mr. Bischoff: Well, our oral testimony will be short and we will be through.

The Court: All right.

Mr. Bischoff: I may say to your Honor, I had intended at the conclusion of our introduction of

testimony to suggest to your Honor deferring oral argument so that we could exchange briefs and then fix the time for oral argument.

The Court: Is that satisfactory, Mr. Winter?

Mr. Winter: Yes; if your Honor wants to take the case under advisement after hearing it.

The Court: Oh, I see. We will do it that way. We will follow that, which is the usual practice in tax cases—submit briefs and then hear you in oral argument.

Mr. Bischoff: At this time I offer in evidence Pre-Trial Exhibit 1, your Honor.

Mr. Winter: If the Court please, there are only two exhibits that I will make any objection to, and I would suggest, to shorten it, that all pre-trial exhibits may be introduced with the exception of those two, and those only go to materiality of something not within the issues in this case.

The Court: In other words, Mr. Winter is consenting to the [2*] introduction now of all of the pre-trial exhibits except two, which he will name in a minute, as to which he reserves exceptions, and I will admit——

Mr. Winter: I reserve the exceptions that will be reserved and set forth in the pre-trial order, your Honor.

The Court: All right.

Mr. Winter: They only go to the materiality and to the competency of one exhibit.

The Court: Here is what we have done in some

*Page numbering appearing at top of page of original Reporter's Transcript.

other tax cases. At the outset we have admitted all pre-trial exhibits in evidence, subject to the same objections as were reserved in the pre-trial order.

Mr. Bischoff: Well, that is all right, then. With that understanding I will offer all of the pre-trial exhibits.

Mr. Winter: And we make the same offer with respect to the two exhibits introduced by defendant.

Mr. Bischoff: Yes. I offer only those which the plaintiff offered, and the defendant offers those which the defendant offered.

The Court: Well, Mr. Person will mark them as trial exhibits.

(The pre-trial exhibits so offered and received were further marked "and trial" as follows:)

Plaintiff's Pre-Trial Exhibit 1: Certified copy of Income Tax Return of plaintiff for year 1936; [3]

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 1

Corporation Income and Excess Profits Tax Return for the Calendar Year 1936 of the Chinook Investment Company, filed March 15, 1937.

Page 1 of Return

EXCESS PROFITS TAX COMPUTATION

Item No.

1. Value of capital stock declared in capital stock tax return, etc.....	\$100,000.00
2. Net income for Excess Profits Tax Computation	\$ 22,741.85
3. Less: Dividends received credit (85% of Item 12(a) page 2).....	23,243.34
4. Balance of Net Income.....	0.00
5. Less: 10% of Item 1.....	10,000.00
6. Net income subject to Excess Profits tax (carry forward as Item 7).....	0.00

INCOME TAX COMPUTATION

Item No.

NORMAL TAX

13. Net income for tax computation (Item 29, page 2)	\$ 22,741.85
15. Less: Dividends received credit (85% of Item 12(a) page 2).....	23,073.33
17. Normal tax net income.....	0.00

SURTAX ON UNDISTRIBUTED PROFITS

23. Net income for surtax computation.....	\$ 22,741.85
28. Adjusted net income (Item 23 minus Items 24-27)	22,741.85
29. Less: Dividends paid credit.....	23,073.33
31. Undistributed Net Income.....	None
41. Total Surtax	None
42. Total Normal Tax and Surtax.....	None
44. Balance of Tax.....	None

Page 2 of Return

Date of incorporation, February 21, 1941 under the laws * * * Oregon.

The corporation's books are in care of R. S. Farrell located at 536 S. W. Front Avenue. Kind of business (in detail) Bonds, Stocks, Real Estate.

NET INCOME COMPUTATION

Gross Income

Item No.

9. Rents	\$11,728.21
11. Capital Gain or Loss (from Schedule B) (If loss, enter such loss or \$2,000, whichever is less) Loss	2,000.00
12. Dividends on stock of:	
(a) Domestic corporation sub- ject to taxation under Title 1 of Rev. Act of 1936.....	27,145.09
14. Total Income in Items 3 and 6 to 13, inclusive.....	\$ 36,873.30

DEDUCTIONS

Deductions Itemized:

15. Compensation of Officers (From Schedule C) ..\$	1,200.00
17. Repairs	82.01
19. Interest paid	3,200.00
20. Taxes Paid	5,050.50
23. Depreciation	4,328.00
25. Other Deductions Authorized by Law:	
(a) Expenses	403.47
(b) Insurance	67.41
26. Total Deductions	\$ 14,331.45
27. Net Income for Excess Profits Tax Compu- tation	\$ 22,541.85
29. Net income for Income Tax Computation.....	\$ 22,541.85

Page 3 of Return

SCHEDULE B—CAPITAL GAINS AND LOSSES

(From Sales or Exchanges Only)

1. Description of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price	5. Cost	9. Gain or Loss
Grandby Copper	5/ 2/30	12/28/36	\$ 2,363.67	\$ 9,006.25	** Loss 6,642.58
Texas Gulf Sulphur.....	4/18/29	12/23/36	7,940.64	11,497.50	** " 3,556.86
Guardian Investors	5/16/28	12/28/36	1,805.50	10,100.00	** " 8,294.50
Port. Gas & Coke.....	6/26/31 ³⁰ ₃₂	12/18/36	10,856.50	24,216.25	** " 13,359.75
Interstate Equities	12/13/28	1936	Bankrupt	3,385.00	** " 3,385.00
N. W. Electric.....	7/30/31	12/28/36	17,409.47	20,300.00	** " 2,890.53
Cat Tractor	1/ 7/29	12/ 7/36	35,534.34	31,611.84	** Gain 3,922.50
Bonds Chile	6/28/29	7/ 1/36	1,371.70	9,200.00	** Loss 7,828.30
Net Loss					

Gain or Loss (enter net amount as Item 11, page 2 if net amount is a loss, enter that amount as \$2,000.00, whichever is less).....Loss 2,000.00

SCHEDULE L—BALANCE SHEET

ASSETS

Page 5 of Return

	Beginning of Taxable Year	End of Taxable Year
4. Inventories	None	None
6. Other Investments		
(a) Stocks of Domestic corporations	\$336,603.64	\$279,601.89
(b) Bonds of Domestic corporations	56,530.50	45,878.00
	<u>393,134.14</u>	<u>325,479.89</u>

8. Capital Assets:

(a) Buildings		
(b) Machinery and Equipment	179,764.43	175,661.43
(d) Delivery Equipment	1,129.69	904.69
(g) Less reserves for depreciation	180,894.12	176,566.12
12. Total assets	574,644.95	547,709.31

LIABILITIES

20. Surplus	252,644.95	225,709.31
21. Undivided Profits	252,644.95	225,709.31
22. Total Liabilities	574,644.95	547,709.31

Page 6 of Return

SCHEDULE M—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

Item

1. Net Income	\$ 22,541.85
3. Balance	22,541.85
4. (c) Other Items of Nontaxable Income	
(1) Capital Stock Dividend	
Alder Investment Company.....	630.00
7. Total of Lines 3 to 6, inclusive.....	\$ 23,171.85
8. Total from Line 16.....	50,107.49
9. Net profit or loss for year, as shown by books, before any adjustments are made therein (Line 7 minus Line 8) (If loss indicate).....	26,935.64
10. Surplus and undivided profits as shown by bal- ance sheets at close of preceding taxable year....	252,644.95
14. Surplus, etc. at close of taxable year.....	225,709.31
15. Unallowable Deductions	
(j) Additions to reserves for contingencies	
(1) Loss Bankrupts, etc.....	11,620.00
(1) Other unallowable deductions (to be detailed)	
(1) Excess over \$2,000.00—loss on stocks and bonds sold.....	38,487.49
16. Total of Line 15.....	50,107.49
17. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property).....	None

SCHEDULE OF DIVIDENDS RECEIVED

Crown Will. Pap. Co.—San Fran.....	728.
American Snuff—Memphis	975.
Texas Gulf Sulphur, N. Y.....	1500.
Pacific Ltg. Co.—Los A.....	300.
Caterpillar Tractor—San Leandro.....	7500.
Iron Fireman—Portland	2527.50
Supervised Shares—Jersey Cy.....	520.50
Kennecott Copper—N. Y.....	340.

Magma Copper—N. Y.....	275.
Petrol. Corp. of Amer., Jersey Cy.....	270.
Transamerica, S. Fran.....	400.
Oregon Worsted, Portland.....	60.
Sperry Corp.—N. Y.....	300.
Peoples Water & Gas—N. Y.....	675.
Anaconda Copper—N. Y.....	125.
Pickle Crow Min. Co.—Toronto.....	19.50
Trans. & West. Air—Kansas Cy.....	6.
Pacific International, Portland.....	550.
N. W. Electric, Portland.....	7056.
Quarterly Shares—Jersey Cy.....	150.
Incorporated Invest., Boston.....	2166.96
Equity Corp.—Jersey Cy.....	473.13
Central & S. W. Utilities.....	227.50
	<hr/>
	127145.09
	<hr/>

[Endorsed]: Filed Dec. 7, 1942.

Plaintiff's Pre-Trial Exhibit 2: Certified copy of letter dated March 2nd, 1937, addressed to Chinook Investment Company;

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 2

TREASURY DEPARTMENT
Internal Revenue Service
Portland, Oregon

March 2, 1937

Chinook Investment Co.
536 SW First Ave.
Portland, Oregon

Gentlemen:—

Receipt is acknowledged of your 1936 Corporation Income and Excess Profits Tax Return.

The return discloses a net income of \$22,541.85. However, you failed to compute the tax liability. The computation is shown below. Kindly forward remittance in payment of all, or at least one-quarter of the tax, on or before March 15, 1937.

J. W. MALONEY, Collector.

INCOME TAX COMPUTATION

Note—Line numbers refer to lines of Form 1120, Page 1

Normal Tax:

13.	Net income for income tax computation.....		\$22,541.85
14.	Less: Interest on obligations of U. S.....\$.....		
15.	Dividends received credit.....\$23,073.33		\$23,073.33
17.	Normal tax on net income.....	none	
Portion of Item 17. Rate			
18.	Tax on por. Item 17 not in excess of \$2000.00.....	8%	\$.....
19.	Tax on por. Item 17 in excess \$2000 and not in excess of \$15,000.....	11%	.....
20.	In excess \$15,000 and not in excess of \$40,000.....	13%	.....
21.	In excess of \$40,000.....	15%	.....
22.	Total Normal Tax.....		\$.....

INCOME TAX COMPUTATION (Continued)

Surtax on Undistributed Profits:

23.	Net income for surtax computation.....	\$22,541.85
24.	Less: Normal tax (Item 22).....\$.....	
25.	Int. on U. S. Obligat. etc.....	\$.....
28.	Adjusted Net Income.....	\$22,541.85
29.	Less: Dividends paid credit.....\$.....	
30.	Cr. for contracts restricting div. payments	\$.....
31.	Undistributed Net Income.....	\$22,541.85
32.	Less Specific Credit.....	\$ 2,745.81
33.	Remainder subject to surtax (Item 31 minus Item 32).....	\$19,796.04

INCOME TAX COMPUTATION (Continued)

	Portion of Item 33	Rate	
34. Tax on por. of Item 33 not in excess of 10% of Item 28.....	\$ 2,254.19	7%	\$ 157.79
35. Tax on por. of Item 33 in excess of 10% and not in excess of 20% of Item 28.....	\$ 2,254.19	12%	\$ 270.50
36. Tax on por. of Item 33 in excess of 20% and not in excess of 40% of Item 28.....	\$ 4,508.38	17%	\$ 766.42
37. Tax on por. of Item 33 in excess of 40% and not in excess of 60% of Item 28.....	\$ 4,508.38	22%	\$ 991.83
38. Tax on por. of Item 33 in excess of 60% of Item 28.....	\$ 6,270.90	27%	\$ 1,693.14
39. Amount of tax in Items 34 to 38, inclusive.....			\$ 3,879.68
40. Plus 7% of amount of specific credit (Item 32).....			\$ 192.21
41. Total Surtax (Item 39 plus Item 40).....			\$ 4,071.89
42. Total Normal Tax and Surtax (Item 22 plus Item 41).....			<u>\$ 4,071.89</u>

[Endorsed]: Filed April 24, 1942.

Plaintiff's Pre-Trial Exhibit 3: Certified copy of claim for refund of \$4,071.89, received by Collector February 18, 1938;

PLAINTIFF'S PRE-TRIAL AND TRIAL
EXHIBIT No. 3

The tax on corporate undistributed profits as levied upon the claimant corporation and collected is illegal, for:

I

The purpose and legislative intent of the surtax on undistributed profits was to impose a levy on those corporations which permitted their earnings and profits to accumulate in the corporate coffers without distribution to the shareholders, so as to equalize the burden of taxation between the corporations and shareholders who received regular dividends subject to annual taxation on the one hand, and those corporations and shareholders who could afford to permit their corporate earnings to accumulate and escape current surtaxes on the other hand.

In his special message to Congress on March 3, 1936, the President stated:

“The accumulation of surplus in corporations controlled by taxpayers with large incomes is encouraged by the present freedom of undistributed corporate income from surtaxes. Since stockholders are the beneficial owners

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

of both distributed and undistributed corporate income, the aim, as a matter of fundamental equity, should be to seek equality of tax burden on all corporate income whether distributed or withheld from the beneficial owners. As the law now stands our corporate taxes dip too deeply into the shares of corporate earnings going to stockholders who need the disbursement of dividends, while the shares of stockholders who can afford to leave earnings undistributed escape current surtaxes altogether.

“This method of evading existing surtaxes constitutes a problem as old as the income-tax law itself. Repeated attempts by the Congress to prevent this form of evasion has not been successful. The evil has been a growing one. It has now reached disturbing proportions from the standpoint of the inequality it represents and of its serious effect on the Federal revenue. Thus the Treasury estimates that, during the calendar year 1936, over 4½ billion dollars of corporate income will be withheld from stockholders. If this undistributed income were distributed, it would be added to the income of stockholders and there taxed as is other personal income. But, as matters now stand, it will be withheld from stockholders by those in control of these corporations. In one year alone, the Government will be deprived

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)
of revenues amounting to over \$1,300,000,000.

“A proper tax on corporate income (including dividends from other corporations), which is not distributed as earned, would correct the serious twofold inequality in our taxes on business profits if accompanied by a repeal of the present corporate income tax, the capital-stock tax, the related excess-profits tax, and the present exemption of dividends from the normal tax on individual incomes. The rate on undistributed corporate income should be graduated and so fixed as to yield approximately the same revenue as would be yielded if corporate profits were distributed and taxed in the hands of stockholders.

“Such a revision of our corporate taxes would effect great simplification in tax procedure, in corporate accounting, and in the understanding of the whole subject by the citizens of the Nation. It would constitute distinct progress in tax reform.”

In the Report of Mr. Doughton, Chairman of the House of Representatives Committee on Ways and Means, representing the majority views, the following purposes were started (P. 3.):

“The President requests the Congress to raise 620 million dollars of additional revenue annually by some form of permanent taxation. He suggests some form of undistributed profits tax. Your committee recognizes the fact that

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

the greatest defect in our present system of taxation lies in the fact that surtaxes on individuals are avoided by impounding income in corporate surpluses. Therefore, your committee proposes a plan of taxation which taxes a corporation on the net income, but which fixes the rate in accordance with the proportion of the net income undistributed.

“The major purposes of the change in the method of taxing corporate incomes are (1) to prevent avoidance of surtax by individuals through the accumulation of income by corporations, (2) to remove serious inequities and inequalities between corporate, partnership, and individual forms of business organization, and (3) to remove the inequity as between large and small shareholders resulting from the present flat corporate rates.

“It is well recognized that the corporate form of doing business enjoys certain advantages over individual and partnership businesses. The existing law creates purely artificial additional advantages in some cases and artificial disadvantages in others, depending upon the size of the enterprise and the character of its ownership. Individuals and partnerships cannot minimize their taxes by failure to distribute their business earnings. Corporations should not be permitted to withhold from the beneficial shareholders unneeded corporate income at the ex-

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

pense of the revenues of the United States and to the detriment of the shareholder. The bill proposes to remove many of these inequities by relieving from tax corporations which distribute all their net earnings annually as earned, and by taxing corporations accumulating their net income at a rate to compensate to a large extent for the amount of tax on the shareholders' income lost by reason of the failure to make a complete distribution. Adequate safeguards are provided in the bill to prevent unreasonable taxation of incomes in the case of corporations in distress or with inadequate earnings to take care of their immediate business needs. No attempt is made under the bill to tax past accumulations of surplus.- - -"

And on Page 8 of the Report, the majority stated:

"This new plan of taxing corporate net income, in the opinion of your committee, will not prevent the retention of earnings sufficient to provide for legitimate corporate needs but will discourage accumulation for which there is no sound reason.- - -"

The entire income of the claimant corporation after applying expenses against other income, was derived from dividends, and, therefore, was not subject to normal taxation under the Revenue Act of 1936. The Majority Report by Mr. Doughton continued (P. 11):

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

“Your committee is of the opinion that corporations which are exempt from the income tax under existing law should not be subject to the proposed plan for taxing corporations. Corporations paying dividends to such corporations receive the same dividend credit as if such dividends were paid to persons not exempt from the income tax.”

The Senate modified the provisions of the House Bill 12395, but retained the principal feature of taxing the corporate undistributed profits. The Senate Finance Committee saw that the evil sought to be remedied was “the retention of profits by corporations to protect investors having large incomes against paying on large incomes”, and modeled its revision along those lines.

The Bill, as finally enacted, provided for such tax on the undistributed profits of corporations, and stated in Section 14 (b):

“Imposition of Tax.—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation a surtax equal to the sum of the following, subject to the application of the specific credit as provided in subsection (c):

7 per centum of the portion of the undis-
tributed net income which is not in excess
of 10 per centum of the adjusted net in-
come. - - -”

According to Section 14 (a) (1), “the term ‘ad-

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)
justed net income' means the net income minus the sum of—

(A) The normal tax imposed by section 13.

(B) The credit provided in section 25 (a), relating to interest on certain obligations of the United States and Government corporations.

(C) In the case of a holding company affiliate (as defined in section 2 of the Banking Act of 1933), the amount allowed as a credit under section 26 (d).

(D) In the case of a national mortgage association created under Title III of the National Housing Act, the amount allowed as a credit under section 26 (e)."

And according to Section 14 (a) (2), "The term 'undistributed net income' means the adjusted net income minus the sum of dividends paid credit provided in section 27 and the credit provided in section 26 (c), relating to contracts restricting dividends."

The claimant corporation sustained an *actual* net loss of \$19,493.17, but due to the \$2,000 limitation imposed by Section 117 (d) of the Revenue Act of 1936 on a net capital loss of \$42,035.02, the net result was distorted so as to indicate a net profit of \$22,541.85 for the calendar year 1936. The Collector of Internal Revenue levied and collected an additional tax based upon the failure to distribute the nonexistent profit, on the theory that since the

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.) net income was computed to be \$22,541.85 and since there were no deductions for purposes of the surtax on undistributed profits, that sum constituting the net income was also the "undistributed net income" and, therefore, was subject to the surtax imposed by Section 14 of the Revenue Act of 1936. The net result of the operations of the year left the claimant with no actual net income, as the term is used by accountants and understood generally. In view of the foregoing expressions of legislative intent, it is submitted that Section 14 was not designed to be imposed upon a statutory net income regardless of the actualities of the situation. Some variation between statutory net income and net income in the accounting sense may be permissible, but not a variation which taxes the failure to distribute that which was completely nonexistent.

II.

The provisions of Section 14 of the Revenue Act of 1936 are unconstitutional and violate the Fifth Amendment to the Constitution of the United States insofar as they set up an arbitrary basis of incidence as applied to the claimant corporation by taxing as "undistributed net income" an amount that is actually nonexistent as income of any character whatsoever.

The Fifth Amendment to the Constitution of the United States provides in part as follows:

"No person shall - - - be deprived of life, lib-

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

erty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Supreme Court regards the due process clauses of the Fifth and Fourteenth Amendments as exact counterparts, despite the difference between the active and passive voice,—*Carroll v. Greenwich Insurance Co.*, 199 U.S. 401, 410, 26 S.Ct. 66, 50 L.Ed. 246 (1905); *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U.S. 146, 156, 40 S.Ct. 106, 64 L. Ed. 194 (1919); 29 *Columbia Law Review* 624, 625, —and the citations are interchangeable. 29 *Columbia Law Review* 321, n. 9, and cases therein cited.

These amendments have been held to apply to corporations as well as individuals. *The Railroad Tax Cases*, 13 Fed. 722, 746; *Portland Railway, Light and Power Co. v. Railroad Commission*, 56 Or. 468, 109 Pac. 273.

The Supreme Court has held that the Fifth Amendment is not only a procedural guaranty, but also a guaranty of substantive due process, the test of which is the reasonableness or arbitrariness of incidence. Mr. Justice Brandeis in the dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410, 52 S.Ct. 443, 76 L.Ed. 815.

In *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 10 AFTR 1609, the Supreme Court, in dealing with the statutory conclusive presumption that transfers made without consideration within two years of the donor's death were made in contemplation of death,

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.) held that this provision of the Revenue Act of 1926 ran afoul of the Fifth Amendment, *supra*. The Court cited *Schlesinger v. Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557, 43 A.L.R. 1224, which involved a similar statute of Wisconsin which was held unconstitutional under the due process clause of the Federal Constitution. The Court proceeded to state:

“The *Schlesinger Case* has since been applied many times by the lower federal courts, by the Board of Tax Appeals, and by state courts; and none of them seem to have been at any loss to understand the basis of the decision, namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.

“Nor is it material that the Fourteenth Amendment was involved in the *Schlesinger Case*, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge v. Long*, 282 U.S. 582, 596, 51 S.Ct. 306, 75 L.Ed. 562. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled. *Nichols v. Coolidge*, 274 U.S. 531, 542, 47 S.Ct. 710, 71 L.Ed.

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)
1184, 52 A.L.R. 1081; *Brushaber v. Union Pac. RR Co.*, 240 U.S. 1, 24-25, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A. 1917D, 414 Ann. Cas. 1917B, 713; *Tyler v. United States*, *supra*, 281 U.S. 504, 50 S.Ct. 356, 74 L.Ed. 991, 69 A.L.R. 758."

Professor Robert Murray Haig has defined income as follows (*The Federal Income Tax* (Columbia University Lectures), p. 27):

"Income is the money value of the net accretion to economic power between two points of time."

In the case at hand, the claimant corporation realized no net accretion to economic power between January 1, 1936 and December 31, 1936, but did realize a net decrease in economic power valued at \$19,493.17. This is the actual fact. In *Hoeper v. Commissioner*, 284 U.S. 206, 52 S.Ct. 120, 76 L.Ed. 248, the Supreme Court in applying the Fourteenth Amendment to the Wisconsin statute said:

"- - -That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols v. Coolidge*, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081."

Nor can that which is not profit constitute undistributed profits.

Taxation is a practical matter, and fiction may not be permitted to obscure the realities. United

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)
States v. Flannery, 268 U.S. 98, 45 S.Ct. 420. In the latter case, the Supreme Court said:

“Since Flannery sustained no actual loss in the transaction in question, having sold the stock for more than it had cost, his executors were not entitled to the deduction which they claimed because it was sold at less than its market value on March 1, 1913.” (Emphasis ours.)

As was stated by Ernst Fuchs (*Wurttembergische Zeitung fur Rechtspflege und Verwaltung*, p. 5, (1909)):

“What we are striving for is that the courts may find the right judgment on the merits by practical sense and true comprehension of the facts, instead of the correct logical deduction by the help of scholastic subtleties.”

See also *Farmers' Loan & Trust Co. v. State of Minnesota*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 8 AFTR 10257, where the Court said plainly:

“Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences.- - -”

In accord, *Jacobs v. Commissioner*, 34 F.(2d) 233, 235, certiorari denied, 280 U.S. 603, 50 S.Ct. 85, 74 L.Ed. 647; *City Bank Farmers Trust Co., Ex'r v. U.S.*, 74 F.(2d) 692 (C.C.A. 2d, 1935); *Irving D. Rossheim*, 31 B.T.A. 857, 867; *Dudley T. Humphrey*, 32 B.T.A. 280, 282.

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

Divorced from realty taxation becomes sheer oppression. When the provisions of Section 14, *supra*, are applied to a taxpayer with an actual loss, they penalize "a lifeless stone for not yielding milk". "Such an exaction is not taxation but spoliation." *Heiner v. Donnan, supra*.

In the *Heiner v. Donnan* case, *supra*, the government counsel maintained that the conclusive presumption created by the statute was a rule of substantive law, and, regarded as such, should be upheld. The Court dismissed this contention completely by saying:

"- - it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the *Schlesinger Case*, as we are not; for that case dealt with a conclusive presumption, and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a pre-

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

sumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. For example, *Bailey v. Alabama*, 219 U.S. 219, 238, et seq., 31 S.Ct. 145, 55 L.Ed. 191; *Manley v. Georgia*, 279 U.S. 1, 5-6, 49 S.Ct. 215, 73 L.Ed. 575. "It is apparent," this court said in the *Bailey Case* (219 U.S. 239, 31 S.Ct. 145, 151, 55 L.Ed. 191) "that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

"If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."

In *Williams Investment Co. v. United States*, 3 Fed. Supp. 225, 12 AFTR 671 (Ct. of Claims, 1933), the Court of Claims dealt with the constitutionality of the surtax on corporations formed or availed of to avoid surtax on their stockholders, which differs from the provisions of Section 14, *supra*, in effect only insofar as it makes the presumption conclusive that the corporation is availed of for the purpose of avoiding the surtax on divi-

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)
dends. The Court upheld the statute because the presumption was merely *prima facie*, and said:

“The section does not make the accumulation of surplus an absolute test for classification, but merely a *prima facie* classification. It does not tax all corporations which accumulate their surplus, but classifies those as subject to the tax who make such accumulations for the purpose of preventing the imposition of the surtax on their stockholders, leaving each corporation free to establish as a fact, if such be the fact, that the accumulation was for the needs of the business. The presumption is not conclusive.”

The purpose of the tax, according to the court, was “to aid in the collection of revenue” and to prevent evasions of the tax laws. As applied to corporations with an actual net income, it accomplished its purpose. In all the cases to which it has been applied, the corporation has had an actual net income which was withheld from its stockholders. But in the case at hand the analogous statute is being applied to a corporation with an operating deficit in fact. There was no net income to distribute to stockholders. Yet the statute makes the *prima facie* presumption of Section 220 of the Revenue Acts of 1924 and 1926 a substantive rule of law, thus embalming the *prima facie* presumption into a conclusive presumption. *Heiner v. Donnan*, *supra*, dealing with a case nearly on all fours, de-

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)
spatched swiftly and thought of the constitutionality of such statute.

The conclusion follows in the matter at hand that by enacting a rule of substantive law that a statutory "undistributed net income" should be subject to taxation regardless of whether such "net income" existed, much less whether there was any to distribute, Congress attempted, "by legislative fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality." *Heiner v. Donnan*, *supra*. Such legislation, by virtue of its arbitrary incidence, violates the Fifth Amendment to the Constitution of the United States and is void.

III.

The provisions of Section 14 of the Revenue Act of 1936 are unconstitutional under Article 9 and the Sixteenth Amendment, for, they impose a tax not on the receipt of income but on its non-disposition, thus taxing the unspent portion of corporate money without apportionment.

The Sixteenth Amendment to the Constitution of the United States provides as follows:

"The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

The other pertinent provisions of the Constitution of the United States are as follows:

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

"Art. 8. Powers of congress.—The congress shall have power—

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

- - -

"Art. 9. Restrictions upon powers of congress.—

- - -

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

A tax on the unspent portion of corporate income is a direct tax. This unspent portion constitutes property which cannot be levied upon without due process of law. *Heiner v. Donnan*, supra. In *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, (1895), a bill was brought by a stockholder in the defendant corporation to enjoin the payment of a tax of two percent on the net profits of the corporation for the year 1894. The bill alleged that defendant's income was derived from real estate, bonds of the city of New York, and corporate bonds and stock. Unconstitutionality of the act was alleged. A demurrer on the ground of want of equity was sustained by the Circuit Court,

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.) and on appeal to the Supreme Court of the United States the decree below was reversed. The Court said:

“- - but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.- -” (Emphasis ours.)

On re-argument the Court added (158 U.S. 601, 15 S.Ct. 912):

“Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

“We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents or products,

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.)

or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.- - -

“The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?”

If a tax on the income is a direct tax, then, a fortiori, a tax on a statutory retained income which already has been subjected to the income tax is a direct tax. By constitutional amendment the income tax need no longer be apportioned. But this broadening of Congressional power did not extend to other direct taxes, which must still be apportioned according to the most recent census.

The surtax on undistributed profits is levied only upon corporations, and is not apportioned among the states according to population. In the case at

Plaintiff's Pre-Trial and Trial Exhibit 3—(Cont.) hand, although there was no actual undistributed net income the tax could not be avoided. Since it is a direct tax, the conclusion follows that it is unconstitutional in its manner of imposition.

Wherefore, the claimant prays that this claim be allowed.

[Endorsed]: Filed Dec. 7, 1942.

Plaintiff's Pre-Trial Exhibit 4: Certified copy of Amended Claim for Refund of \$4,071.89, received by Collector June 30, 1939, together with letter dated September 20, 1939, addressed to Chinook Investment Company, disallowing the claim;

PLAINTIFF'S PRE-TRIAL AND
TRIAL EXHIBIT No. 4

AMENDED CLAIM FOR REFUND

The tax on corporate undistributed profits was improperly levied upon the claimant corporation and is illegal for the following reasons:

I

The purpose of the act was to compel distribution of earnings and profits

1. To prevent tax avoidance by stockholders.
2. To put money in circulation.

1. Dividends are taxable as income to the stockholders only when paid out of gains or profits

or out of surplus accumulated since February 28, 1913. There were no gains or profits for the taxable year in the case at bar and the stockholders would have been subjected to tax only on the theory that any distribution made would have been out of previously acquired surplus, which was not otherwise subject to tax, even though undistributed.

2. The money sought to be put in circulation was gains and profits. The act was not expressly made retroactive and should not be construed to affect previously accumulated gains and profits.

It will be seen, therefore, that a tax in the case at bar does not accomplish the purpose of the act, as in this case there were actually no gains or profits to be retained or distributed.

II

The statute must be construed together and all of its parts must be considered to determine the legislative intent.

1. The act described the tax as a tax on undistributed profits. If Congress had intended to impose a tax on undistributed statutory net income, regardless of whether in fact there was any actual income, it did not indicate any such intention in the title of the act. Words should be taken in their plain and accepted meaning. Revenue acts are to be strictly construed against the government. A tax expressly designed to reach undistributed profits has no application where there are no profits.

2. The tax is imposed upon net income in an amount measured by the undistributed net income. If the tax had been expressly imposed upon undistributed gains and profits, it would undoubtedly have been a direct tax and in violation of the United States constitution. For that reason it was expressly imposed on net income but in order to effect the plain purpose of the act the rate was made to depend upon the gains and profits not distributed. Where there are no gains and no profits, which could be construed to mean undistributed income, as in the claimant corporation's case there is no measure for the tax and none was intended to be imposed.

3. In determining the undistributed net income, the act allows a deduction for dividends paid, but only when paid out of earnings or profits. The deduction for dividends paid is part of the same act and that section must be construed with the one imposing the tax. The deduction was allowed obviously so that corporate income distributed should not be made subject to tax in order to encourage such distributions. The income sought to be taxed, therefore, was that available for distribution which was retained. Dividends may be paid only out of gains or profits. When they are subject to tax, the taxing act applies only when there are such gains or profits, and when capital losses exceed such gains and profits in the taxable year, it has been held that such losses reduce the income available for distribution in that year so

as to eliminate the tax, unless such distribution may be construed to have been made out of previously accumulated earnings and profits. Similarly, the deduction for dividends distributed is limited to earnings and profits, either acquired in the taxable year or previously accumulated. The claimant corporation did have a previously acquired surplus and would have been entitled to a dividend paid credit if a distribution had been made but it is a violation of the spirit and purpose of the act to make the incidence of the tax depend upon the distribution or failure to distribute such a previously acquired surplus. In no sense could such surplus be held income of the corporation in the tax year to which the act refers.

It seems clear when all provisions of the act are considered that the undistributed profits tax was intended to reach only such income as was subject to distribution as dividends and then only in the event it was not distributed. In order to tax gains and profits which in this case do not exist, it is necessary to disregard the title, scheme and purpose of the act as expressly set out by Congress. It is submitted, therefore, that capital losses must enter into the computation to fix the gains and profits subject to tax.

III

The capital losses incurred by the claimant corporation are deductible in full as having been incurred in the normal course of business by a regular dealer in stock and securities.

1. The Chinook Investment Company under its charter is empowered to buy and sell stocks and bonds and transact business usually transacted by a credit or finance company, to purchase, rent, drain, improve, cultivate and sell lands; to construct and maintain buildings, streets, railroads and street railroads leading to its properties, to deal in franchise for public utilities and to prospect and mine for mineral deposits.

2. The corporation maintains regular offices and has employees who devote substantial portions of their time to the corporate business of buying and selling and operating investments.

3. Numerous purchases and sales of securities are made by the corporation in the regular course of business and all purchases are made for the purpose of resale at a profit.

IV

The provisions of Section 14 of the Revenue Act of 1936 violate the Fifth Amendment to the Constitution of the United States insofar as they set up an arbitrary basis of incidence as applied to the claimant corporation by taxing as undistributed net income an amount which is actually non-existent as income of any character whatever.

V

The provisions of Section 14 of the Revenue Act of 1936 violate Article 9 and the Sixteenth Amendment to the Constitution of the United States in that they impose a tax not on the receipt of

net income but on its non-disposition, thus constituting a direct tax, without apportionment, on the unspent portion of corporate money.

VI

The provisions of Section 14 of the Revenue Act of 1936 violate the Tenth Amendment to the Constitution of the United States in that they attempt to regulate the internal affairs of corporations created by the states and constitute the exercise of powers not delegated to Congress.

Wherefore, the claimant prays that this claim be allowed.

[Endorsed]: Filed April 24, 1942.

Plaintiff's Pre-Trial Exhibit 5: Certified copy of Income Tax and Excess Profits Tax Return for 1937, filed by Chinook Investment Company;

PRE-TRIAL AND TRIAL EXHIBIT No. 5

Corporation Income and Excess Profits Tax Return for the Calendar Year of 1937 of the Chinook Investment Company, filed March 9, 1938.

Kind of business: Real Estate, Stocks and Bonds.

Page 1 of Return

EXCESS PROFITS TAX COMPUTATION

Item

1. Net income for Excess Profits Computation.....	\$ 15,113.50	
2. Value of Capital Stock.....	\$122,500.00	
3. Ten percent of Item 2.....	12,250.00	
4. Dividends received credit (85% of Schedule F, Column 2).....	21,460.26	33,710.26
8. Total Excess Profits Tax.....		None

NORMAL TAX COMPUTATION

9. Net income for income tax computation.....	15,113.50	
10. Dividends received credit (85% of Schedule F, Column 2).....	21,410.40	
12. Balance subject to normal tax.....		None
17. Total normal tax.....		None

UNDISTRIBUTED PROFITS SURTAX COMPUTATION

23. Net income for income tax computation.....	\$ 15,113.50	
24. Normal Tax	None	
26. Adjusted Net Income.....	15,113.50	
27. Dividends paid credit.....	10,000.00	
29. Undistributed net income.....	5,113.50	
30. Portion of Item 29 taxable at 7%.....	5,000.00 7%	350.00
31. Portion of Item 29 taxable at 12%.....	113.50 12%	13.62
35. Total Surtax		363.62
40. Total Tax Due.....		363.62

Page 2 of Return

SCHEDULE A—NET INCOME COMPUTATION
GROSS INCOME

Item

7. Interest on loans, etc.....	180.00
9. Rents	18,418.91
11. Capital Gain (or loss) (from Schedule E).....	*2,000.00
12. Dividends	25,188.70
14. Total Income	41,787.61

*Represents loss.

DEDUCTIONS

Item	
18. Repairs	\$ 1,774.72
20. Interest	8,726.37
21. Taxes	9,829.72
24. Depreciation	5,212.87
26. Other deductions	1,130.43
27. Total Deductions	26,674.11
<hr/>	
28. Net income for excess profits computation.....	\$ 15,113.50
29. Less Federal excess profits tax.....	None
30. Interest on obligations of United States.....	None
31. Net income for income tax computation.....	\$ 15,113.50

SCHEDULE B—RECONCILIATION OF NET INCOME
AND ANALYSIS OF EARNED SURPLUS AND UN-
DISTRIBUTED PROFITS

1. Total distribution to stockholders charged to earned surplus during the taxable year.....	\$ 10,000.00
3. Federal Income taxes.....	4,072.00
10. Excess of capital loss, if any, over amount, al- lowable as a deduction in Item 11, Schedule A	18,652.79
15. Earned surplus and undivided profits as shown by balance sheet at close of taxable year (Schedule N)	208,899.19
<hr/>	
16. Total	241,623.98
17. Earned surplus (etc) close of preceding tax- able year	225,709.31
18. Net income for income tax computation.....	15,113.50
19. Other nontaxable dividend.....	742.50
" " "	54.17
" " "	4.50
<hr/>	
23. Total	241,623.98

SCHEDULE M—DISTRIBUTIONS TO STOCKHOLDERS
AND DIVIDENDS PAID CREDIT

Page 4 of Return

1. Cash	\$ 10,000.00
10. Total of Items 1 to 9.....	10,000.00

Dividends Paid Credit

11. Taxable distributions	10,000.00
13. Dividends paid credit.....	10,000.00
14. Adjusted net income.....	15,172.17

15. Dividend carry-over	5,172.17
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Reconciliation

16. Total distribution out of earnings, etc.....	10,000.00
17. Total distribution charged to earned surplus, etc.	10,000.00
18. Total distribution during taxable year.....	10,000.00

SCHEDULE N—BALANCE SHEETS

Page 5 of Return

ASSETS	Amount	Beginning of Taxable Year	Amount	End of Taxable Year
		Total		Total
1. Cash		\$45,663.30		\$13,586.16
6. Other Investments				
(a) Stocks of domestic cor- porations	279,601.89			
(b) Bonds of domestic cor- porations	45,878.00			
(c) All other in- vestments or loans		325,479.89		304,195.32
8. Capital Assets				
(a) Bldgs & land	175,661.43		294,913.36	
(d) Delivery equip- ment	904.69		679.69	
(g) Less re- serve for deprecia- tion		176,566.12		295,593.05
10. Total Assets		547,709.31		613,374.52

LIABILITY AND CAPITAL

19. Earned surplus and undivided profits	225,709.31		208,899.19
20. Total liabilities and capital	547,709.31		613,374.62

SCHEDULE P—NATURE OF BUSINESS

Page 6 of Return

NONMANUFACTURING

Finance

- (x) Investment trusts, stock syndicate,
stock holding corporation

CHINOOK INVESTMENT CO.

CAPITAL GAINS AND LOSSES

Description	Date Acquired	Sale Price	Cost	Loss or Gain
Stock—Bankers Trustee	4/22/29	311.50	3,515.69	(3,204.19)
Stock—Transamerica	11/23/36	3,278.93	4,623.21	(1,344.28)
Stock—Iron Fireman	11/26/36	7,475.90	10,769.60	(3,293.70)
Stock—Pickle Crow Min. Co.....	4/ 6/36	1,018.42	1,229.06	(210.64)
Stock—Pullman Co.	12/ 7/36	5,665.98	12,721.05	(7,055.07)
Stock—Standard Oil of Cal.....	1/22/37	3,220.18	4,570.75	(1,350.57)
Stock—Briggs Co.	1/ 7/37	1,301.72	2,704.80	(1,403.08)
Stock—Texas Corp.	1/28/37	4,223.91	5,248.40	(1,024.49)
Stock—N. W. Public Service Co.....	8/20/31	168.00	4,000.00	(3,832.00)
Stock—General Motors	1/ 7/37	1,634.91	3,165.00	(1,530.09)
Stock—Caterpillar Tractor	12/10/30	9,464.31	3,280.50	6,183.81
Bonds—Quarterly Income Shares.....	10/16/37	404.82	470.00	(65.18)
Bonds—Sourthern Pacific R. R.....	12/ 2/36	5,070.69	7,594.00	(2,523.31)

Net Loss.....

(20,652.79)
6,183.81*

26,836.60*

*Figures written in with pencil.

CHINOOK INVESTMENT CO.
INCOME FROM DIVIDENDS

Schedule F

Meier & Frank, Portland.....	\$ 18.00
Standard Oil Co. of Cal., San Francisco.....	200.00
Texas Gulf Sulphur, New York.....	1,100.00
Magma Copper, New York	275.00
New England Fish Co., Boston.....	246.00
Maryland Fund, New Jersey.....	602.17
Anaconda Copper, New York.....	175.00
N. W. Electric Co., Portland.....	5,698.00
American Snuff, Memphis.....	975.00
Pickle Crow Mining Co., Montreal.....	18.85
Briggs Mfg. Co., Detroit.....	125.00
Kennecott Copper, New York.....	645.83
Texas Corp., New York.....	225.50
Oregon Port. Cement, Portland.....	500.00
Incorporated Investors, Boston.....	822.00
Pullman Co., Wilmington, Del.....	300.00
Iron Fireman, Portland	1,962.00
Crown Zellerbach, San Francisco	648.67
Petrol. Corp. of Amer., New York.....	381.00
Peoples Water & Power, New York.....	300.00
Equity Corp., Jersey City.....	109.00
Crown Will. Paper Co., San Francisco.....	196.00
Caterpillar Tractor, San Francisco.....	5,260.00
Oregon Worsted, Portland	60.00
Transamerica, San Francisco	455.00
Quarterly Income, Jersey City.....	1,175.00
Supervised Shares, Jersey City.....	261.00
Pacific Lighting Co., Los Angeles.....	300.00
Cent. & S. W. Utilities, Chicago	910.00
Bankers Trustee, New York	18.68
Sperry Corp., New York.....	360.00
Bank of America, San Francisco.....	66.00
Pacific Internal Assn., Portland.....	550.00
North Amer. Aviation, New York.....	37.50
Richfield Oil Co., Los Angeles.....	25.00
General Motors, Detroit.....	187.50
Total.....	\$25,188.70

[Endorsed]: Filed Dec. 7, 1942.

Plaintiff's Pre-Trial Exhibit 6: Certified copy of Return on Personal Holding Company form for year 1937, of Chinook Investment Company;

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 6

Return of Personal Holding Company for Calendar Year 1937, Chinook Investment Company.
Page 1 of return

ADJUSTED NET INCOME COMPUTATION UNDER TITLE 1 A

Item	
1. Net income	\$19,918.77
4. Total of Items 1 to 3.....	19,918.77
6. Less: Federal income, war profits and excess- profits taxes	4,072.00
<hr/>	
10. Adjusted Net Income	15,846.77
12. Less: Dividends paid credit \$10,000.00	
14. Total of Items 12 and 13.....	10,000.00
15. Undistributed adjusted net income.....	5,846.77

COMPUTATION OF TAX

16. Surtax on portion of Item 15 not in excess of \$2,000 at 65%.....	1,300.00
17. Surtax on amount of Item 15 in excess of \$2,000 at 75%	2,885.08
<hr/>	
18. Total surtax in Items 16 and 17.....	4,185.08

Furnish below the names and addresses of the individuals who owned directly or indirectly at any time during the last half of the taxable year more than fifty per cent in value of the outstanding capital stock of the corporation:

Name	Address	Highest Percentage Owned During Last Half of Year
1. Robert S. Farrell, Sr.	Portland, Ore.....	43%
2. Nancy Jane & Robert S. Farrell, Jr.	Portland, Ore.....	23.8%
3. Marion L. Kingery	Portland, Ore.....	24%
4. Other members of family	Portland, Ore.....	9.2%

AFFIDAVIT OF ROBERT S. FARRELL

Portland, Oregon

November 14, 1939

Collector of Internal Revenue
Portland, Oregon

Delinquency in filing the Federal corporation income tax return for the period ending December 31, 1937, was due to the following reasons:

A return on Form 1120 was prepared and filed and failure to file the Form 1120P for Personal Holding Companies was due to the fact that it was the contention of the taxpayer that it was not a Holding Company and hence not required to file Form 1120P. The returns of the taxpayer had been examined for the year 1936 and the company declared not to be a Personal Holding Company, and the officers believed that the status of the Company had not changed as to the year 1937. The return herewith submitted is submitted at the request of the Internal Revenue Agent and the signing and submission thereof is made with the specific reservation that it is not an admission of affiant's liability as a Personal Holding Corporation, but is made

for the purpose of avoiding litigation if possible, and in the hope that an equitable determination of the taxpayer's status may be made without the necessity of legal action. The right to later contest the validity of the assessment as a Personal Holding Company is specifically reserved.

CHINOOK INVESTMENT
COMPANY

By ROBT. S. FARRELL
President

Subscribed and sworn to before me this 15 day
of November, 1939.

ROSALIE NOVAK

Notary Public for Oregon

My Commission Expires: 10/21/42.

[Endorsed]: Filed April 24, 1942.

Plaintiff's Pre-Trial Exhibit 7: Certified
copy of Internal Revenue Agent's Report dated
April 20, 1939;

Plaintiff's Pre-Trial Exhibit 8: Certified
copy of Waiver of Restrictions on Assessment
and Collection of Deficiency in Tax for 1937;

Plaintiff's Pre-Trial Exhibit 9: Certified
copy of Claim for Refund of \$363.62, received
by Collector [4] February 27, 1939;

Plaintiff's Pre-Trial Exhibit 10: Certified
copy of letter dated March 16, 1940, to Chinook

Investment Company, Portland, Oregon, from Guy T. Helvering, Commissioner;

Plaintiff's Pre-Trial Exhibit 11: Certified copy of Amended Claim for Refund of \$363.62 with interest, received by the Collector June 30, 1939;

Plaintiff's Pre-Trial Exhibit 12: Certified copy of Amended Claim for Refund of \$5,271.68, etc., together with copy of letter dated April 1st, 1941, to Chinook Investment Company, from Guy T. Helvering, Commissioner;

PRE-TRIAL AND TRIAL EXHIBIT No. 12

AMENDED CLAIM FOR REFUND

I.

Claimant's income in 1937 for normal tax purposes was as follows:

	Per Return	As Adjusted
Interest	180.00	180.00
Rents	18,418.91	18,418.91
Dividends	25,188.70	25,361.19
Total	43,787.61	43,960.10
Sale of bonds		
Loss (\$20,652.79) Allowed.....	(2,000.00)	(2,000.00)
	41,787.61	41,960.10
Deductions	26,674.11	22,041.33
Net Income	15,113.50	19,918.77
Dividends Received Credit.....	21,410.40	21,557.01
Balance subject to normal tax....	None	None

The excess-profits tax was computed as follows:

	Per Return	As Adjusted
Value of Capital Stock.....	122,541.85	122,541.85
Net Income for excess-profits.....	15,113.50	19,918.77
Less Dividends received credit....	21,410.40	21,557.01
<hr/>		
Balance of Net Income.....	None	None
Less 10 percent of Capital Stock value	12,254.19	12,254.19
Balance subject to excess-profits tax	None	None

It will be observed that no normal or excess profits tax was assessed. There is one objection, nevertheless, to the Commissioner's adjustments, as above set out, which is important with reference to other taxes assessed. That is to the disallowance of a deduction as an expense of \$4,632.78 paid as State and County taxes on property purchased on February 6, 1937. At the time of the purchase, none of the taxes for the previous year were due or payable, the assessment roll not having been delivered to the collector. Under the provisions of section 69-710, Oregon Code Annotated, 1935, the taxes were the obligation of the grantee. This section reads as follows:

“Grantor and Grantee—liability for taxes—
As between the grantor and the grantee of any real estate or real property, when there is no express agreement as to payment of the taxes thereof becoming due and payable in the calendar year of the sale, the grantor shall be liable in the same proportion of such taxes as the part of the year prior to the day of the sale

of such property bears to the whole of such year, and the grantee shall be liable for the remainder of such taxes.”

It is clear, therefore, that the taxes for the portion of the year subsequent to February 6, 1937, became the liability of the purchaser when the assessment rolls were delivered to the collector, and was properly deductible, therefore, as an expense incurred after acquisition of the property and was not part of the capital investment as contended by the Commissioner. It will be noted that the claimant was on the cash basis and that the statute quoted was adopted in 1935. The case of *Crown Willamette Paper Co.*, 14 BTA 133 (1928) on which the Commissioner relies, therefore, is not applicable.

II.

As to the determination that the Chinook Investment Company is a Personal Holding Company, insofar as the stock ownership is concerned, the company comes within the provision of the statute, but the requirements as to stock ownership and as to income are conjunctively stated in the act and the two conditions must concur in order to bring the corporation within the provisions of the statute.

It is the contention of this taxpayer that the amount of income from interest and dividends is not sufficient to subject the corporation to the provisions of the statute defining Personal Holding Company income. The question as to whether the income is such as to subject the Chinook Invest-

ment Company to the provisions of the act relating to Personal Holding Companies hinges upon the relation of the rent collected to the gross income of the corporation. We find by reference to section 352 of the Revenue Act of 1937, the following provisions:

“Sec. 352. Definition of Personal Holding Company.

“(a) General Rule.—For the purposes of this title and of Title I the term ‘personal holding company’ means any corporation if—

“(1) Gross Income Requirement.—At least 80 per centum of its gross income for the taxable year is personal holding company income as defined in section 353; - - -”

“Sec. 353. Personal Holding Company Income.

“For the purposes of this title the term ‘personal holding company income’ means the portion of the gross income which consists of:

“(a) Dividends, interest, royalties (other than mineral, oil, or gas royalties), annuities.”

“(g) Rents.—Rents, unless constituting 50 per centum or more of the gross income.”

From the above it will be noted that at least 80% of the gross income of a corporation must be “personal holding company income” in order to subject a corporation to tax. It is further to be noted that rents are to be included in such income unless they constitute 50% or more of the gross income of the corporation. By reference to the return of the Chi-

nook Investment Company, it will be noted that the items of income are as follows:

Interest on bank deposits, notes, etc.....	180.00
Rents	18,418.91
Loss from sale of stocks, bonds, etc.....	(20,652.79)
Dividends from corporations.....	25,188.70
<hr/>	
Gross Income	23,134.82

It is obvious from this computation that the rents exceed 50% of the total gross income by a wide margin, and hence for this reason, should not be included in the "personal holding company income".

The point of difference as to whether the rents exceed or do not exceed 50% of the gross income lies in the question as to whether in determining the total gross income, the corporation is limited to the loss of \$2,000, or whether they takes into account the losses actually sustained through the sale of stocks and bonds of \$20,652.79. In the determination of gross income, if any portion of the amount as reflected on the return is to be taken into account, the entire amount should be taken into consideration in determining the company's gross income. The sales of stocks and bonds during the year amounted to a sum in excess of \$100,000, and it goes without saying that "gross income" is represented by some measure of the price received for the goods. "Gross income" is generally conceded to mean the sale price of the article sold less the cost or other basis. Applying this accepted conception of "gross income" to the present situation, it is clear that the

full loss from the sale of the securities should be taken into account in determining gross income, and that the result of so doing is to make the "personal holding income" less than 80% of the total, and the ultimate result of this is to take this company out of the personal holding company classification, and, therefore, \$4,185.08 of the tax claimed herein was improperly assessed.

III.

A tax of \$1,086.60 was assessed on undistributed profits, based upon net income for surtax computation of \$19,918.77 (instead of \$15,285.99, which, in Section I, we showed was proper) less a dividends paid credit of \$10,000.00.

It will be noted in the tabulation under Section I, that taking into consideration the entire loss on the sale of bonds, \$20,652.79, there was an actual loss on claimant's year's operations in the amount of \$3,560.61, based on claimant's return. In assessing a tax on undistributed profits, this loss has been treated as earnings and profits in the sum of \$9,918.77.

This tax was improperly and illegally imposed for the following reasons:

1. Section 14 of the Revenue Act of 1936, purporting to impose a tax on undistributive profits, cannot apply when there are no profits;

2. If the tax is imposed on net income measured by the gains and profits not distributed, there is no measure for a tax when in fact there are no gains and profits;

3. Section 14 of the Revenue Act of 1936 should be construed with Section 23 as a part of the same Act, to determine the intent of Congress;

4. The effect of the imposition of a tax, in the instant case, is to make the incidence of the tax depend upon the distribution or failure to distribute a previously acquired surplus, which was not income to the claimant in the taxable year, to which the tax is restricted by Section 14(b);

5. The imposition of a tax in the instant case is a violation of the spirit and purpose of the Act.

6. The Capital losses incurred by the claimant corporation are deductible in full as having been incurred in the normal course of business by a regular dealer in stock and securities. The Chinook Investment Company is empowered by its charter to buy and sell stocks and bonds and transact business usually transacted by a credit and finance company; the corporation maintains regular offices and has employees who devote substantial portions of their time to the corporate business of the buying and selling and the operation investments; numerous purchases and sales of securities are made by the corporation in the regular course of business and all purchases are made for the purpose of resale at a profit.

7. The provisions of Section 14, 21, 22 and 23 of the Revenue Act of 1936, as applied to claimant, violate Article 9 and the 16th Amendment to the Constitution of the United States in that they impose a tax not on the receipt of net income but on its

non-disposition, thus constituting a direct tax, without apportionment on the unspent portion of corporate money.

8. The provisions of Sections 14, 21, 22 and 23 of the Revenue Act of 1936 violate the Tenth Amendment to the Constitution of the United States in that they attempt to regulate the internal affairs of corporations and constitute the exercise of powers not delegated to Congress.

9. The provisions of Section 14, 21, 22 and 23 of the Revenue Act of 1936 violate the Fifth Amendment to the Constitution of the United States in that they are arbitrarily retroactive in imposing a tax, in the instant case, on a surplus previously acquired.

Wherefore, the Claimant prays that this claim be allowed.

[Endorsed]: Filed April 24, 1942.

Plaintiff's Pre-Trial Exhibit 13: Certified copy of Articles of Incorporation of Chinook Investment Company;

PRE-TRIAL AND TRIAL EXHIBIT No. 13

* * * Chinook Investment Company—the duration perpetual; the enterprise, business, pursuit or occupation:

1. To own, buy, sell, or to acquire by sale, trade or exchange, bonds, notes, mortgages and other evi-

dences of indebtedness or shares of stock in other corporations, and to exercise while the owner thereof all the rights, powers and privileges, including the right to vote thereon, that a natural person being owner thereof might, could or would exercise, negotiate loans and transact any other business usually transacted by a credit or finance company.

[Endorsed]: Filed April 24, 1942.

Plaintiff's Pre-Trial Exhibit 14: Bundle of invoices of purchases and sales of stock by plaintiff;

Plaintiff's Pre-Trial Exhibit 14-a: Bundle of invoices of purchases and sales for year 1936 (previously part of Plaintiff's Pre-Trial Exhibit 14); and

Plaintiff's Pre-Trial Exhibit 14-b: Bundle of invoices of purchases and sales for the year 1937 (previously part of Plaintiff's Pre-Trial Exhibit 14); [5]

Defendant's Pre-Trial Exhibit 15: Certified copy of letter dated November 28, 1939, to Chinook Investment Company from J. W. Maloney, Collector, Portland, Oregon, in re deficiency in income tax for 1937 amounting to \$722.98; and

Defendant's Pre-Trial Exhibit 16: Certified copy of letter dated November 28, 1939, to Chinook Investment Company from J. W. Ma-

loney, Collector, in re deficiency in income tax for 1937 amounting to \$4,185.08.

Mr. Bischoff: Now at this time I will also offer in evidence the Pre-Trial transcript, after it is transcribed by the reporter. He hasn't been able to transcribe it.

The Court: It may be admitted.

(The transcript of Pre-Trial Proceedings so offered and received was later produced and marked Plaintiff's Exhibit 17.)

PLAINTIFF'S EXHIBIT No. 17

"Mr. Winter: If the Court please, in order that the Court might understand it, counsel has used the word "losses" in a general term. We are not concerned with losses in the operation, I mean operation losses or losses in the business; we are talking about a capital loss. The situation is briefly this: The taxpayer in this case had gross income which, without question, would put it in the classification of a personal holding company; that is its 80 per cent, or 70 per cent, whichever percentage is applicable to the situation here in question; that is, more than 80 per cent, for example; that is income lost from interest and the other items specified in the statute, which, of course, your Honor recalls in the previous personal holding income case which we tried here some time ago."

"Mr. Bischoff: Your Honor, perhaps I should have made my statement as to the law is-

sue as full as Mr. Winter did. It didn't occur to me this was the proper time, but may I be permitted to supplement what I said in that connection, to this extent? I don't intend to argue the point but to make the issue clear.

"It is our view that losses sustained in the sale of stocks under the circumstances in this case do not constitute capital losses within the meaning of the statute. Our position is that such losses from the sale of capital stock may or may not be loss on capital assets, depending upon the circumstances in each given case. That has to be determined as a fact in each case. Our view is that under the circumstances of the taxpayer's business, that the stock does not constitute capital asset, and, therefore, they would be entitled to take all of the loss sustained, instead of being limited to a two thousand dollar loss if it were capital asset. That is the first legal contention."

"Mr. Winter: Yes. We think it is purely a question of law in this case.

"Mr. Bischoff: Of course we don't agree with you that they are capital losses. All I was trying to ascertain is as to the figures."

[Endorsed]: Filed Feb. 24, 1942.

ROBERT S. FARRELL

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: May I have your correct name for the reporter, please.

The Witness: Robert S. Farrell.

By Mr. Bischoff:

Q. Mr. Farrell, are you an officer of the Chinook Investment Company? A. I am.

Q. What office do you hold?

A. President. [6]

Q. And are you a stockholder of the Chinook Investment Company? A. I am.

Q. How long were you president of the Chinook Investment Company?

A. Thirty-one years.

Q. When was the Chinook Investment Company organized? A. 1911.

Q. And you became an officer, president, then?

A. I did.

Q. And have been president of the company ever since? A. I have; yes, sir.

Q. Who are the present stockholders and how much stock does each stockholder own at the present time? If you would like to refresh your recollection from the minute book you may do so.

Mr. Winter: Mr. Bischoff, we stipulated that with respect to 1937 the only issue involved in the

(Testimony of Robert S. Farrell.)

personal holding company income, it met the requirements fixed by the statute. I don't see the materiality of all this. Let's get down to facts which are material. What difference does it make who owns it now?

Mr. Bischoff: I think while we agree that, so far as stock ownership, it comes within the definition of the holding company statute, I think it is relevant for the Court to know, in considering the character of its business, which will be in issue as to how the stock is held.

Mr. Winter: Mr. Bischoff, you are not contending that— [7] your return for your personal holding company filed for the year 1937 shows the stock ownership. Are you contending anything different than that? The Court can get it from that.

Mr. Bischoff: I don't recall that it did set forth the names of the stockholders.

Mr. Winter: Oh, yes; the names of the stockholders and the per cent they own.

Mr. Bischoff: At any rate, we would like to make our case and show the facts we think are relevant, your Honor, upon the other issues.

Mr. Winter: We object to it on the ground it is immaterial what is the ownership now, and that is the question.

The Court: He may answer, subject to the objection.

Mr. Bischoff: You may answer, Mr. Farrell.

(Testimony of Robert S. Farrell.)

A. R. S. Farrell, Sr.—that is I—215 shares; my son, Junior, 119 shares; Marion Kingery 120 shares; Susan M. Farrell 6 shares; Frederick Kingery 10 shares; Susan Kingery 10 shares; Joan Farrell 10 shares; Sally Farrell 10 shares.

Q. Now has the stock ownership been substantially the same for some years past, or have there been any changes?

A. It has for many years, yes.

Q. Mr. Farrell, what is the business of the Chinook Investment Company?

A. It is a company we organized to buy and sell real estate, stocks, bonds, automobiles, merchandise of any kind—buy and [8] sell, of course, for a profit. We didn't organize to sell for a loss, but we have sold for a loss.

Q. And has it been engaged in that business from the time of its organization?

A. It has.

Q. Is there anything in the way of a division of responsibilities or duties in the corporation? What part of the business have you looked after principally?

A. I, as president of the corporation, look after the buying and the selling of practically all the merchandise, all of the stocks and bonds and real estate, and I have the authority to sign checks and make loans. The minutes of the company give me that authority.

Mr. Winter: Now wait. We object to it and ask that it be stricken as hearsay, not the best evi-

(Testimony of Robert S. Farrell.)

dence. He says that is what the books authorize. The books are the best evidence of what they authorize.

The Court: The answer may stand, subject to the objection.

Mr. Bischoff: Q. What part of the business does your son conduct?

A. My son is the manager of the company and looks after the real estate, the renting and securing of tenants, and making repairs and various other items connected with the real estate, in which I take no personal interest.

Q. Has this division of responsibilities as you have practiced [9] them been the same for some years past?

A. For many years back.

The Court: The name Susan Kingery, that is your married daughter, is it?

A. Yes. That is my daughter's daughter, Susan Kingery. Marion Kingery is my daughter.

The Court: You have just the two children, just the daughter and the son?

A. That is all.

Mr. Bischoff: Q. Mr. Farrell, in the purchase and sale of securities, did you limit that in any way to securities that are spoken of as listed securities; that is, those that are sold on exchanges; or did you buy and sell over the counter and from hand to hand, from parties?

Mr. Winter: Oh, if the Court please, I think the question is entirely leading. Why doesn't he ask

(Testimony of Robert S. Farrell.)

him for the facts, not suggest answers? I object to it on the ground it is leading.

The Court: Go ahead and give the facts, Mr. Farrell. You know what we want to get at, the facts of the case.

A. We bought and sold them over the counter, and also at random, and also listed securities, and anywhere.

Mr. Bischoff: Q. Do you maintain an office for the transaction of the business of the company, for the sale and purchase of securities? [10]

A. We do. We have an office at 536 Southwest First Avenue.

Q. And did you maintain that office in 1936 and 1937?

A. No. We had to move there this last year; a year ago we were at the same number Southwest Front Street and the Front Street improvement took it over.

Q. Did you maintain an office for the transaction of that business in 1936 and 1937?

A. We did.

Q. Where was that office maintained?

A. 536 Southwest Front Avenue.

Q. In the years 1936 and 1937, and for several years preceding that, how extensive was the business of the corporation in the purchase and sale of securities?

A. We bought and sold, I would, just guessing at it, say from two hundred to three hundred thou-

(Testimony of Robert S. Farrell.)

sand dollars a year; generally bought and sold about the same amount, because we never carried much cash on hand.

Q. I don't quite understand the answer. Do you mean that the sales would amount from two to three hundred thousand a year? A. Yes.

Q. And the purchases would amount to approximately the same?

A. About the same, because we kept the cash moving all the time.

Q. Will you explain the process or the procedure that you employed generally during those years that I have spoken of, as to the manner in which you bought securities? [11]

A. I keep in very close touch with the market; in fact, I belong to Babson & Company, and take the Financial World, and other financial papers, and watch the stock market every day in the paper, except Monday, because there is no market on Sunday, and when I find something that looks reasonably well to buy, or if I have something that looks well to sell, I do buy or sell as I see fit.

Q. That has to do with the listed securities?

A. With the listed securities, yes.

Q. Now what is your practice with respect to the securities that you buy privately? You state generally how that business was carried on.

A. I have a number of unlisted securities, such as the Oregon Pulp & Paper Company, St. Helens Pulp & Paper Company, some of these local com-

(Testimony of Robert S. Farrell.)

panies, and if I feel that the market justifies my buying I buy them; if I feel it justifies selling I sell them. To do so I go to the broker or to an outsider, often to an outsider, and ask him if they wish to buy or if they have any to sell, if I know they have any, which I do. I know the stockholders of these companies very well, because I attend the annual meetings; I have one this afternoon of the St. Helens Pulp & Paper Company; and I know most of the stockholders and we confer with each other on prices, and if I want to buy any more, which I may do this afternoon, or if I want to sell any I may sell. [12]

Q. You mean by that you make purchases direct from other owners of stock?

A. Direct from other owners. I have bought numbers of times from the owners.

Q. Now was that practice followed in 1936 and in 1937? A. It was.

Q. And was that practice generally followed in the preceding years? A. It was.

Q. Are you solicited at your office by people who have securities for sale, or who want to buy securities?

A. Yes. We are solicited, I would safely say, at least every day five brokers, and sometimes as many as ten, come to my office or phone and ask if I want to buy or sell.

Q. Now in these negotiations or dealings with brokers, are those for the purpose of selling or buy-

(Testimony of Robert S. Farrell.)

ing for your account, or are those transactions involving direct sales by you to them, or direct purchases by you from them?

A. Either direct purchases, one way or the other. I never buy or sell on margin, if that is what you are asking about.

Mr. Winter: I ask that that question be stricken as not responsive. He asked him if he purchased stock for others, or just for his own corporation—purchased and sold for others.

Mr. Bischoff: No, that wasn't the question. [13]

Mr. Winter: Well, if that wasn't the question, then we will object to any further testimony on this line, unless you are contending that they come within—that this corporation comes within the exception of the buying and selling of stock under the exemption in the statute. Do you claim it comes within the exception?

Mr. Bischoff: May it please the Court, the question I asked was designed to bring out whether, in these negotiations with brokers whether they were negotiating a sale or purchase by the broker, or the Chinook Investment Company's account as broker, or whether it was a case of a direct purchase from the broker, or a sale to the broker, as distinguished from an agency transaction. That was what my question was.

Mr. Winter: You don't contend there regular dealers in stock come within the exemption, do you?

Mr. Bischoff: I maintain that the business of

(Testimony of Robert S. Farrell.)

this corporation was in part the purchase and sale of securities as a regular business.

Mr. Winter: Oh.

The Court: What you call trading business?

Mr. Bischoff: I beg pardon?

The Court: Would you call it a trading business, trading company?

Mr. Bischoff: I don't know whether your Honor uses the term "trading" in the restricted sense. It was a regular part of [14] their business to buy and sell merchandise, the same as a merchant buys and sells merchandise.

Mr. Winter: Not to buy for someone else?

Mr. Bischoff: No.

Mr. Winter: Or to sell for someone else, except their own stock?

Mr. Bischoff: We don't claim that the Chinook Investment Company was a brokerage house buying or selling for anybody else. We don't claim that.

Mr. Winter: My question, if the Court please—my objection, if the Court please, was, if that was their business, which I take it now they don't claim, that it is a regular dealer in stocks within the exception in the statute, to object on the ground that was not one of the grounds alleged in the claim for refund. They never claimed that, have not tried to show that in any respect, and it is not pleaded in the case. But since they are saying they are not trying to show it comes within that exception, then it is irrelevant and immaterial.

(Testimony of Robert S. Farrell.)

The Court: There is a definite type in the investment world, many of whom I have known personally, who buy and sell constantly.

Mr. Winter: For their own investment, yes.

The Court: Their own investments, and while this is a corporation, I take it that is the type of business you are seeking to establish here. [15]

Mr. Bischoff: Yes. It bought for its own account and sold for its own account.

The Court: A man could go down to any financial district anywhere and find in most any financial office people who make their living that way. Having accumulated a certain amount of money and invested it, they are moving their investment in and out all the time; and I take it that is what you claim was Mr. Farrell's business?

Mr. Bischoff: We claim it, not as investments but as business.

Mr. Winter: They are still capital assets, if they own them. They can't be anything else.

Mr. Bischoff: I am not arguing that as a legal matter. I am trying to explain what the facts are and the Court will draw his conclusion from them. I am trying to distinguish the type of business the corporation engaged in from the trader that buys on margin, a few points margin from day to day and turns over a day's point or two. I was trying to get the exact picture as it is, so in the end your Honor will draw your own legal conclusion as to what kind of a corporation this is.

(Testimony of Robert S. Farrell.)

The Court: Oh, I think I understand from what Mr. Farrell has said. He said something about two to three hundred thousand dollars. We will take the latter figure. If he had \$300,000 employed in this business he kept it moving.

Mr. Bischoff: Yes. [16]

The Court: And he sought to make money as a trader for his own account, buying from the man who had to sell at a disadvantage, for reasons of his own, and selling, and the man who wasn't as good a buyer as Mr. Farrell was the seller.

Mr. Bischoff: That is substantially it.

The Court: That is a common type in the investment world.

Mr. Bischoff: Now Mr. Farrell, did you buy and sell on margin?

A. I never did.

Q. All your purchases are for cash, and you sell for cash?

A. Always. I should say "we" instead of "I". I or we either, never have.

Q. It is the corporation I am talking about.

A. In other words, we are not gamblers.

Q. Now did you buy the securities for the purpose of salting them away and merely drawing dividends, or did you buy them with a view of selling them at a profit?

Mr. Winter: If the Court please, we will object to that as calling for a conclusion of the witness. I think he can state what he actually did, when he

(Testimony of Robert S. Farrell.)

bought them, what he bought, and when he sold. It would be a rank conclusion.

The Court: He may answer, subject to the objection.

Mr. Bischoff: You may answer.

A. We always bought and sold for a profit, tried to do so.

The Court: You never had anything you would not sell if you could make a profit on it? [17]

A. No. Of course we don't want to, but we did sell at a loss. We never salt it away, put it in a safe deposit box and say, "We will never look at it again", saying it is a good investment. That wasn't the idea of the company.

The Court: In fact, you figured on getting part of your living out of what you could make in your trading, didn't you?

A. That is what I make my living at.

Mr. Winter: The capital loss was \$28,000 in one year. He didn't make much of a living.

Mr. Bischoff: Q. Mr. Farrell, I will ask you to look at this bundle of invoices of purchases and sales, which have been marked Plaintiff's Exhibit 14, 14-a and 14-b, and I will ask you to state what they represent.

A. These are invoices of purchases and memorandas of sales made by the Chinook Investment Company for many years back.

Q. Now Mr. Farrell, I will ask you to look at the bundle which is marked Exhibit 14-a and state

(Testimony of Robert S. Farrell.)

if that is the group of transactions that were handled in 1936.

Mr. Winter: Those were all purchases, I think.

The Witness: This is marked 14.

Mr. Bischoff: Well, just take the rubber band off and take them apart. May I have permission to go up to the witness stand?

The Court: Yes.

Mr. Bischoff: Q. I show you this Exhibit 14-a and ask you [18] if these are invoices covering the transactions handled in 1936?

A. They are.

Q. And I will show you the bundle that has been marked Exhibit 14-b and ask you if those are invoices representing transactions in securities handled in 1937. A. They are.

Q. Now Mr. Farrell, are these all of the invoices covering all of the transactions, purchases and sales, that the Chinook Investment Company engaged in during that period of time?

A. They are not all. Previous to 1936 we had probably many more, and while our offices were at 536 Southwest Front Avenue, when we were compelled to move on account of the Front Street improvement I happened to be out of the city at the time and our boys that are in the store with us, they moved my stuff and evidently lost a lot of it because I couldn't find some, oh, in the '20's and looking for them the other day I found some things I had lost for the past year that I hadn't known

(Testimony of Robert S. Farrell.)

were there. They evidently took out from our store of Everding & Farrell two truckloads of old papers and books to the crematory and had them burned up because they thought they were of no value, and evidently took some of my papers previous to 1936, some of the sales tags and purchase papers.

Q. Are these all the invoices that you were able to locate?

A. These are all I have been able to locate at present. Possibly I could find more by looking through everything, but so far [19] that is all I could find.

Mr. Bischoff: Your Honor, these are exhibits among those which Mr. Winter has objected to, and I don't know whether it is necessary to re-offer them or whether your Honor will deal with them in conclusion.

The Court: I consider them admitted subject to the objection.

Mr. Bischoff: You may cross examine.

Cross Examination

By Mr. Winter:

Q. Mr. Farrell, when you testified as to the stock ownership, in your personal holding company return for personal holding company for 1937, you set forth 43 per cent of the stock, common stock, was owned by yourself, and 23.8 per cent was held by Nancy Jane and Robert S. Farrell, Jr., and 26 per cent by Marion L. Kingery—24 per cent—and

(Testimony of Robert S. Farrell.)

other members of the family 9.2 per cent, the total 100 per cent. Those were all members of your family, were they?

Mr. Bischoff: Just one moment, Mr. Farrell. I have no objection to the question as such, except the statement of counsel which is incorporated into the question that that is the corporation's personal holding company return. That is not the fact, and this was a return prepared by the revenue agent for execution by the taxpayer, and who refused to execute it as such because it didn't regard itself legally as a personal holding company.

[20]

Mr. Winter: I beg your pardon. You want to look at the return. It is subscribed and sworn to by your witness, and also endorsed by Mr. Jacob, of counsel here, signed by him. Evidently you haven't seen it. You offered it in evidence.

Mr. Bischoff: Your Honor, without conceding—we have no objection to the question as such, but we don't want to be understood as consenting that this represents a corporation personal holding company return. That is the legal implication in the question.

Mr. Winter: Q. Showing you, Mr. Farrell, what has been marked as Plaintiff's Exhibit 6, I will ask you whether or not that is your signature appearing thereon, on the front page there.

A. On the black one?

Q. Yes. Is that your signature?

(Testimony of Robert S. Farrell.)

A. That is my signature.

Q. Did you subscribe and swear to it before a notary public? A. Yes.

Q. And that is your return? A. Yes, sir.

Q. And when you report in there the percentages of stock owned by you and your family they were correct, were they?

A. I didn't figure them out now, but if I signed it it was correct.

Q. It was correct. Then all of the stock was owned by you and your family during practically all of the time of this corpora- [21] tion?

A. Well, indirectly, by indirect family some.

Q. Well, you are talking about sons-in-laws and daughters-in-law; is that correct? Is that what you mean by indirect?

A. Yes; and grandsons and grandchildren.

Q. Now Mr. Farrell, you testified that you were buying and selling securities for the corporation for a profit to the corporation, for an investment for the corporation; isn't that right?

A. For what?

Q. The corporation was investing in stocks, wasn't it? A. Yes.

Q. Yes. And you, as president and secretary, handled that end of the business?

A. Yes, sir.

Q. All right. Now I will show you what has been marked for identification, what has been introduced in evidence as Plaintiff's Pre-Trial Ex-

(Testimony of Robert S. Farrell.)

hibit 1, and ask you to turn to Schedule B, Capital Gains and Losses, and ask you to just state to the Court when you purchased those stocks shown therein and when you sold them, and the names of them. First, the name of the stock, Schedule B?

A. This list up here (indicating)?

Q. Yes. What is the first stock listed there?

A. Grandy Copper Company.

Q. And when did you acquire it?

A. 1930. [22]

Q. And when did you sell it? A. '36.

Q. You held that stock for six years?

A. Yes.

Q. All right. Now read the next one.

A. Texas Gulf Sulphur Company.

Q. All right. When did you acquire that?

A. 1929, I think it is.

Q. Yes. And you sold it? A. '36.

Q. Some seven years later, in '36?

A. Yes.

Q. All right. What was the next stock?

A. Guardian Investors, 1928, sold in '36.

Q. Yes. A. Shall I read on?

Q. Yes. Read the next one.

A. Portland Gas & Coke.

Q. When did you acquire it?

A. 1932, and sold in '36.

Q. Yes. Now the next one?

A. Northwest Electric.

Q. When did you acquire it? A. 1931.

(Testimony of Robert S. Farrell.)

Q. When did you sell it? [23]

A. Sold it in '36.

Q. The next one?

A. Interstate Securities—no; Interstate Equities.

Q. When did you acquire that?

A. It is such fine writing you can hardly see it. 1928.

Q. 1928. You didn't sell it until when?

A. '36.

Q. Then the next one?

A. Caterpillar Tractor, 1929, sold it in '36.

Q. That is seven years later, is that right, after you acquired it? A. Yes, sir.

Q. Then the next one.

A. Chile, bonds of the Government of Chile, 1929.

Q. When did you sell them?

A. Sold them in '36.

Q. In every stock there you have shown the profit and loss on the sale during that year you had acquired more than four years prior to the time you sold them, and you held them that long, didn't you? A. Yes, sir.

Q. That is right. And you subscribed and swore to that return, did you not? A. I did.

Q. And it is true? [24] A. It is.

Q. And you claimed a capital loss on the sale of some of those stocks, one of which showed a profit; is that right? A. Yes, sir.

Mr. Winter: I think that is all.

(Testimony of Robert S. Farrell.)

Redirect Examination

By Mr. Bischoff:

Q. Mr. Farrell, with respect to this former exhibit that was shown to you by Mr. Winter, Exhibit 6, was this letter of explanation for the execution of that personal holding company return attached to the return when you made it? Please hand this to the witness. Just read that letter and state if that letter of explanation wasn't attached to the return when you made it.

A. No, it was not. It was after.

Q. No. Just look at it again and see.

A. It says 1939 up here.

Q. Well, that may recall to you that this supplemental return was filed in 1939.

A. Oh.

Q. Just read the letter and see if that won't refresh your recollection as to the submission of that letter with the return.

A. I state here that at the time that we paid the tax we did not regard it——

Mr. Winter: I object to it as not responsive. He can answer [25] whether it was or not.

Mr. Bischoff: Let him get through with what he wants to say and then make a motion.

Mr. Winter: No. You asked him whether it was attached thereto or not, and it calls for a "yes" or "no" answer.

A. It was not attached to the original return.

Mr. Winter: Yes.

(Testimony of Robert S. Farrell.)

Mr. Bischoff: Q. But was it attached to this supplemental return that was filed?

Mr. Winter: I don't know of any supplemental return that was filed.

Mr. Bischoff: Well, this paper you just tendered him, to which that letter was attached. That is what I am referring to.

Mr. Winter: You are referring to your Exhibit 6.

Mr. Bischoff: Yes.

A. It evidently was attached to the supplementary return.

Q. That is what I wanted. May I have that exhibit, Mr. Bailiff, please.

The Witness: It says there, "The return herewith submitted", so it must have been attached to it.

Mr. Bischoff: May I call to your Honor's attention, in explanation of the objection that I made, this letter, which forms a part of the exhibit and is attached thereto, reads:

"Collector of Internal Revenue, Portland,
Oregon.

"Delinquency in filing the Federal Corporation Income [26] Tax Return for the period ending December 31, 1937, was due to the following reasons:

"A return on Form 1120 was prepared and filed and failure to file the Form 1120P for Personal Holding Companies was due to the

(Testimony of Robert S. Farrell.)

fact that it was the contention of the taxpayer that it was not a Holding Company and hence not required to file Form 1120P. The returns of the taxpayer had been examined for the year 1936 and the company declared not to be a Personal Holding Company, and the officers believed that the status of the Company had not changed as to the year 1937. The return herewith submitted is submitted at the request of the Internal Revenue Agent and the signing and submission thereof is made with the specific reservation that it is not an admission of affiant's liability as a Personal Holding Corporation, but is made for the purpose of avoiding litigation, if possible, and in the hope that an equitable determination of the taxpayer's status may be made without the necessity of legal action. The right to later contest the validity of the assessment as a personal holding company is specifically reserved.

“CHINOOK INVESTMENT
COMPANY,

By ROBERT S. FARRELL,
President.

“Subscribed and sworn to before me this 15
day of November, 1939.”

And that corresponds to the date of the execution of the supplemental return to which it is attached. That is all. [27]

(Testimony of Robert S. Farrell.)

Recross Examination

By Mr. Winter:

Q. But the information upon that return you swore to was the truth, the information according to your books as to the stock ownership?

A. It was the truth.

Q. Yes.

A. So far as I know now it was, I would say, the truth, because I swore to it.

Mr. Winter: That is all.

The Witness: I don't generally swear to anything that *it* not the truth.

Mr. Winter: That is all.

(Witness excused.)

Mr. Bischoff: That is the plaintiff's case, your Honor.

Mr. Winter: We rest.

The Court: How much time for briefs?

Mr. Bischoff: May we have fifteen days for the plaintiff's brief?

The Court: Your time, Mr. Winter?

Mr. Winter: May I have an equal amount, your Honor? I find it difficult to take less than that after receipt of brief, because I usually wait until I get the brief.

The Court: Five or ten days for reply, if deemed necessary? [28]

Mr. Bischoff: Yes, your Honor. That is all right.

Mr. Winter: May I inquire, will you prepare the pre-trial order?

Mr. Bischoff: I will prepare the pre-trial order and I will send it to you before it is submitted.

Mr. Winter: Yes.

The Court: Adjourn until tomorrow morning at ten o'clock.

(Thereupon at 2:54 o'clock P. M. the hearing was concluded.) [29]

[Title of District Court and Cause.]

CERTIFICATE OF COURT REPORTER

I, Alva W. Person, hereby certify that I reported in shorthand all of the oral proceedings had and evidence given upon the hearing of the above entitled cause on Tuesday, February 17, 1942, before the above entitled Court, Honorable Claude McColloch, Judge, presiding; that I subsequently reduced my shorthand notes to typewriting, and the foregoing and hereto attached 20 pages of typewritten matter, numbered 1 to 29, both inclusive, constitute a full, true and accurate record of said oral proceedings and evidence given upon said hearing so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this February 21st, 1942.

ALVA W. PERSON

Court Reporter. [30]

[Endorsed]: No. 10324. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Chinook Investment Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed December 5, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court
of Appeals for the Ninth Circuit

No. 10324

CHINOOK INVESTMENT COMPANY,
Appellee,

vs.

UNITED STATES OF AMERICA,
Appellant.

APPELLANT'S STATEMENT OF POINTS

Comes now the United States of America, appellant above named, and for its Statement of Points upon which it intends to rely in this appeal adopts the Statement of Points filed by it in the United States District Court in connection with its Notice of Appeal and included in the tran-

script of record prepared and certified by the Clerk of the said District Court, page 34 thereof.

CARL C. DONAUGH

United States Attorney

MASON DILLARD

Assistant United States
Attorney

THOMAS R. WINTER

Special Assistant to the Chief
Counsel, Bureau of Inter-
nal Revenue

Copy received this 5th day of October, 1942.

S. J. BISCHOFF

Of Counsel for Plaintiff

[Endorsed]: Filed Dec. 5, 1942.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant

vs.

CHINOOK INVESTMENT COMPANY, a corporation,
Appellee

On Appeal from
The District Court of The United States
for the District of Oregon

Brief for the United States

SAMUEL O. CLARK, Jr.,
Assistant Attorney General
SEWALL KEY,
WILLARD H. PEDRICK,
Special Assistants to the
Attorney General.

CARL C. DONAUGH,
United States Attorney

JAMES H. HAZLETT,
Assistant United States Attorney

FILED

FEB - 1963

PAUL P. O'BRIEN,

No. 10324

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Circuit Court of Appeals
for the Ninth Circuit**

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IN THE UNITED STATES
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FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,
Appellant

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CHINOOK INVESTMENT COMPANY, a corporation,
Appellee

On Appeal from The District Court of The United
States for the District of Oregon

Brief for the United States

OPINION BELOW

The memorandum opinion of the District Court
(R. 20) is unreported.

JURISDICTION

This notice of appeal (R. 33) involves federal income tax for the tax years 1936 and 1937 (R. 22-25). The tax for 1936 was paid by the taxpayer in 1937. (R. 22-23) A claim for refund was filed February 18, 1938 (R. 60-79) and an amended claim was filed June 29, 1939 (R. 23,

79-84). This amended claim for refund was rejected by the Commissioner on September 20, 1939. (R. 23) The tax for 1937 was paid by the taxpayer in 1938 and 1939. (R. 25) On February 27, 1939, a claim for refund for a portion of the tax then paid was filed and an amended claim therefor was filed June 30, 1939. (R. 25, 26, 93.) On September 24, 1940, an amended claim for additional refund was filed. (R. 26.) The claims for refund of the 1937 tax were rejected with the last rejection on April 1, 1941. (R. 26.) More than six months after filing these claims for refund and on September 18, 1941 (R. 2-8), the taxpayer instituted an action in the District Court for the District of Oregon for recovery of taxes paid. The judgment allowed the claim in full and was entered on June 16, 1942. (R. 32-33.) Within three months and on September 14, 1942, the United States filed a notice of appeal (R. 33) pursuant to the provisions of Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether losses sustained upon the sale of securities in the tax years 1936 and 1937 are deductible in full under Section 23 (f) of the Revenue Act of 1936 or are subject to the \$2,000 limitation imposed by Section 117 (d).

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 14. SURTAX ON UNDISTRIBUTED PROFITS.

(a) Definitions.—As used in this title—

(1) The term “adjusted net income” means the net income minus the sum of—(none of the deductions pertinent here).

* * * * *

(b) *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation a surtax equal to the sum of the following, subject to the application of the specific credit as provided in subsection (c): * * *

* * * * *

SEC. 21. NET INCOME.

“Net income” means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by Corporations.*—In the case of a cor-

poration, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

(j) *Capital Losses*.—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117 (d).

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(b) *Definition of Capital Assets*.—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * * *

(d) *Limitation on Capital Losses*.—Losses from sales or exchanges of capital assets shall be allowed only to the extent of \$2,000 plus the gains from such sales or exchanges. * * *

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES. (As amended by Section 1 of the Revenue Act of 1937, c. 815, 50 Stat. 813)

There shall be levied, collected, and paid, for each taxable year (in addition to the taxes imposed by Title I), upon the undistributed adjusted net income

of every personal holding company a surtax equal to the sum of the following: :

* * * * *

SEC. 352. DEFINITION OF PERSONAL HOLDING COMPANY. (As amended by Section 1 of the Revenue Act of 1937, *supra*)

(a) *General Rule.*—For the purposes of this title and of Title I the term 'personal holding company' means any corporation if—

(1) *Gross Income Requirement.*—At least 80 per centum of its gross income for the taxable year is personal holding company income as defined in section 353; * * *

SEC. 353. PERSONAL HOLDING COMPANY INCOME. (As amended by Section 1 of the Revenue Act of 1937, *supra*)

* * * * *

(g) *Rents.*—Rents, unless constituting 50 per centum or more of the gross income. * * *

SEC. 357. MEANING OF TERMS USED. [As amended by Section 1 of the Revenue Act of 1937, *supra*.]

The terms used in this title shall have the same meaning as when used in Title I.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 22(c)-5. *Inventories by dealers in securities.*— * * * For the purpose of this rule (respecting

the reporting of inventories by dealers in securities) a dealer in securities is a merchant of securities, whether an individual, partnership or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. * * * Taxpayers who buy and sell or hold securities for investment or speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade or business, and officers of corporations and members of partnerships who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule.

ART. 117-2. *Limitations on capital gains and capital losses.*— * * *

Section 117(d) provides a limitation on deductions for capital losses affecting all taxpayers including corporations, that is, losses from sales or exchanges of capital assets shall be allowed as deductions only to the extent of \$2,000 plus the gains from such sales and exchanges. * * *

STATEMENT

The relevant facts as found by the District Court may be briefly summarized as follows:

The taxpayer is an Oregon corporation authorized to buy and sell securities. (R. 21-22.) For the calendar year 1936 the taxpayer sustained losses from the sale of securities of some \$40,035.02. (R. 26.) By virtue of this loss no

"net profits" were made for that year. (R. 28-29.) The income tax return filed by the taxpayer for 1936 showed no taxable income. The Commissioner thereafter assessed a deficiency of \$4,071.89 as surtax on undistributed profits. (R. 22.) Payment was made in 1937 and 1938. A refund claim filed June 29, 1939, was rejected. (R. 23.)

For the calendar year 1937 the taxpayer sustained losses from the sale of securities of some \$20,652.79. (R. 27.) By reason thereof no "net profit" was made for that year. (R. 28-29.) The income tax return filed by the taxpayer for 1937 showed a tax liability of \$363.62 as undistributed profits tax which was paid. (R. 23.) Thereafter the Commissioner assessed a deficiency of \$5,417.42 as a personal holding company tax on undistributed profits. The deficiency was paid in 1939. (R. 23, 25) Refund claims for the original tax and the deficiency were rejected. (R. 26.)

Assessments of the 1936 and 1937 deficiencies rested on application of Section 117 of the Revenue Act of 1936 to computation of undistributed profits tax and personal holding company undistributed profits tax. Under Section 117 (d) corporate losses on sales of "capital assets" are deductible only to the extent of the gains from such sales plus \$2,000. Capital assets as defined in Section 117 (b) do not include "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

On the basis of the evidence adduced the District Court found that during 1936 and 1937 the taxpayer bought and sold some \$200,000 to \$300,000 worth of securities for its own account and that the purchases and sales were made in both small and large transactions, through brokers and with private individuals. (R. 27-28.) This course of business was characterized by the District Court as follows (R. 27):

That the stocks and bonds held by it [the taxpayer] during the said calendar years [1936 and 1937] were held by it primarily for sale to customers in the ordinary course of its trade or business, and not for investment or speculation, * * *

Accordingly the District Court held the losses sustained during 1936 and 1937 on the sales of securities were not capital losses under Section 117 but were deductible in full so that the taxpayer was subject to neither the undistributed profits tax for 1936 nor the personal holding company tax provisions for 1937. (R. 30.) Judgment for the full amounts claimed, \$4,071.89 for 1936 and \$5,781.04 for 1937, plus costs, was entered for the taxpayer. (R. 32-33.) From that judgment this appeal is prosecuted.

SUMMARY OF ARGUMENT

Section 117 of the Revenue Act of 1936, making losses on the sale of "capital assets" nondeductible in excess of

the gains from such sales plus \$2,000, is applicable in determining the corporate "net income" on which are based the surtax on undistributed profits imposed by Section 14 and the surtax on undistributed personal holding company income imposed by Section 351 of the Revenue Act of 1936, as amended. Capital assets as defined in Section 117 exclude "property held by the taxpayer primarily for sale to customers in the ordinary course of his business". The legislative history of this exception makes clear, however, that it does not extend to securities held by investors or speculators. Such securities are "capital assets" under Section 117.

The evidence adduced before the District Court clearly established that the taxpayer's securities business was that of investment and speculation. The finding of the District Court to the contrary is not supported by the record. Moreover, such a finding is reviewable as one of law or mixed law and fact under this Court's previous decision in *Commissioner v. Boeing*, 106 F. 2d. 305. Since the securities sold by the taxpayer were held for investment or speculation they were capital assets within the meaning of Section 117 and the taxes complained of in this respect were properly assessed.

In light of previous decisions of the Supreme Court there is no substantial question presented respecting the constitutionality of the taxes so assessed.

ARGUMENT

I

Section 117 of the Revenue Act of 1936 Limits the Deductibility of Losses on the Sales of Securities by a Corporation Speculating or Investing therein

Section 117 (d) of the Revenue Act of 1936, *supra*, limits deductibility of losses from the sale of "capital assets" to the gains of such sales plus \$2,000. This restriction on deductibility of such losses is clearly applicable to computation of the surtax on undistributed profits imposed by Section 14 of the Revenue Act of 1936, *supra*, and the surtax on undistributed personal holding company income imposed by Section 351 of the Revenue Act of 1936 as amended by the Revenue Act of 1937, *supra*.

The tax levied by Section 14 of the Revenue Act of 1936 is based on the corporate "net income" minus certain credits not here relevant.¹ Definition of the term "net income" as used in the revenue act thus determines the applicability to computation of the surtax on undistributed profits of the limitation on deductibility of capital losses. As used in the various revenue acts the

(1) It may be noted that certain deductions from net income for purposes of the normal tax imposed by Section 13, such as the dividend received credit provided in Section 13 (a) (2), are not allowed in computing the surtax on undistributed profits under Section 14. The base figure for both taxes is statutory "net income".

phrase "net income" is a term of art, made so by statutory mandate. It is a term precise and technical in content rather than a generality connoting concepts from accounting or economics.² Section 21 provides that "'Net income' means the gross income computed under section 22 less the deductions allowed by section 23".

The "gross income", computed under Section 22, includes gains from any source and these gains are not to be diminished for gross income purposes by the losses on sales of "capital assets" within the meaning of Section 117.

(2) It is elementary that the terms "earnings" or "profits" as used in Section 115, defining dividends, are unrelated to the concept of statutory net income. Paul, *Selected Studies in Federal Taxation* (Second Series, 1938) 155 *et seq.*; Rudick, "Dividends" and "Earnings or Profits" Under the Income Tax Law, 89 U. of Pa. L. Rev. 865 (1941). None of the revenue acts has permitted deduction of all expenses and losses in ascertaining statutory net income. As Justice Holmes observed in *Weiss v. Wiener*, 279 U.S. 333, 335, "The income tax laws do not profess to embody perfect economic theory."

The surtax on undistributed profits has been sustained in situations where the corporate taxpayer has had nothing available for distribution, because the base for the tax is not profits available for distribution but statutory net income. *Helvering v. Northwest Steel Mills*, 311 U.S. 46; *Crane-Johnson Co. v. Helvering*, 311 U.S. 54 Cf. *Foley Securities Corp. v. Commissioner*, 106 F. 2d 731 (C.C.A. 8th). When Congress intends reference to earnings and profits in the accounting sense the phrase "net income" is not used.

The applicable regulations so provide.³ Were it otherwise the provision in Section 23, *supra*, for deduction of such losses from gross income in ascertaining net income would be meaningless or produce a double deduction most certainly not intended by Congress. Section 23, enumerating allowable deductions from gross income, includes corporate losses in subsection (f). Subsection (j) of the same section provides, however, that losses from the sale of capital assets are governed by Section 117 (d). Thus it follows, as stated above, that the limitation on deductibility of losses from sales of capital assets is applicable to computation of the surtax on undistributed profits imposed by Section 14 of the Revenue Act of 1936.

(3) Regulations 94, Article 351-2, issued under the Revenue Act of 1936, provides with respect to ascertaining liability for the personal holding company surtax that:

The gross income for purposes of section 351 (b) (1) means (1) in the case of a domestic corporation its gross income as defined in sections 22, * * *. In determining gross income, subtractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold. Sales of capital assets as defined in section 117 must be treated as separate transactions and only those sales which individually resulted in profits shall be considered in determining the gains derived from such source. Gains from all transactions involving stock in trade, etc., are determined for the taxable year as a whole instead of separately.

It is also clear that Section 117 (d) is applicable to determining whether the taxpayer's income is personal holding income within the meaning of Section 353 of the Revenue Act of 1936, as amended, *supra*, so as to subject it to the surtax on such income imposed by Section 351 of that act.⁴ As seen above, losses on the sale of capital assets within the meaning of Section 117 are not deductible in determining gross income under Section 22 of the Revenue Act of 1936 and are deductible in determining net income under Section 23 of that act only to the extent permitted by Section 117 thereof.

Section 357 of the Revenue Act of 1936, as amended, *supra*, requires that the terms imposing the surtax on undistributed personal holding company income must be given the same meaning as given them in Sections 21, 22 and 23. Hence, losses nondeductible by reason of Section 117 diminish neither "gross income" nor "net income" for purposes of ascertaining liability for the surtax on personal holding company income imposed by Section

(4) The other requisite for classification of a corporation as a personal holding company under Section 352 of the Revenue Act of 1936, as amended, *supra*, is not in issue, i.e., more than 50 per cent of the value of the corporate stock was owned by five or less individuals at one time during the year. The return as filed by the corporation showed such ownership (R. 92) and the testimony of the only witness confirmed it (R. 118-120, 126).

351.⁵ Thus, in determining whether rentals constituted 50 per cent or more of the taxpayer's gross income so as to remove it under Section 353 (g) of the Revenue Act of 1936, as amended, from the purview of the personal holding company surtax, losses nondeductible under Section 117 (d) cannot be applied to diminish gross income. Nor is the net income subject to the tax reduced by such nondeductible losses.

Application, by the taxpayer in the first instance (R. 51), of Section 117 (d) to losses from securities sold by the taxpayer in 1936 and 1937 so as to limit their deductibility to \$2,000 resulted in assessment of the surtax on undistributed profits for 1936 and the surtax on personal holding company income for 1937. The complaint in this action to recover these taxes paid is based solely on the proposition that those losses were deductible in full. (R. 2-8.) Since, as seen above, Section 117 (d) is applicable to computation of the surtax on undistributed profits imposed by Section 14 of the Revenue Act of 1936

(5) It is significant that Section 351 of the Revenue Act of 1936 as originally enacted provided that in determining "undistributed adjusted net income" subject to the tax on personal holding company income that nondeductible losses under Section 117 were to be deducted from "net income". No provision for such a deduction appears in Sections 351-360 of the Revenue Act of 1936, as amended by the Revenue Act of 1937, imposing the surtax on personal holding company income after December 1936.

and to ascertaining liability for the surtax on personal holding company income imposed by Section 351 of the Revenue Act of 1936, as amended, the question is reduced to whether the securities sold by the taxpayer were "capital assets" within the meaning of Section 117.

It was the taxpayer's contention before the District Court that the securities sold by it in 1936 and 1937 constituted "property held by the taxpayer primarily for sale to customers in the ordinary course of his [its] trade or business" within the meaning of that exception to the definition of all property as capital assets in Section 117 (b). (R. 13, 112-113.) The District Court so characterized the taxpayer's securities in its findings of fact. (R. 27.) However, in *Commissioner v. Boeing*, 106 F. 2d 305, 307, this Court held that such a finding is one of law or one of mixed law and fact so as to be reviewable.

The exception in Section 117 (b) from the definition of all property as capital assets of "property held by the taxpayer for sale to customers in the ordinary course of his trade or business" does not extend to securities held by a speculator or an investor however active his trading. The Circuit Court of Appeals for the Fifth Circuit squarely so held in *Commissioner v. Burnett*, 118 F. 2d 659. Accord: *Farr v. Commissioner*, 44 B.T.A. 683. The soundness of these decisions can be shortly demonstrated by reference to the legislative history of Section 117 of the Revenue Act of 1936.

Under the revenue acts prior to 1932 an investor or speculator in securities could deduct losses sustained on their sale without serious limitation.⁶ To meet this situation the Revenue Act of 1932, c. 209, 47 Stat. 169, provided in Section 23 (r) that losses from sales of stock and bonds not classed as "capital assets" should be deductible only to the extent of the gains from such sales. An exception was made in the case of "dealers in securities". The Committee Report (S. Rep. No. 665, 72d Cong., 1st

(6) As did prior acts, Section 101 of the Revenue Act of 1928, c. 852, 45 Stat. 791, restricting deductions for losses on sales of "capital assets", did not restrict deductibility of losses sustained on the sale of property, including securities, held less than two years.

Although losses on the sale of securities held for more than two years were deductible only to the extent of the gains from such sales plus $12\frac{1}{2}$ per cent of the net loss on such transactions, an exception was made where the securities could be classed as "property held by the taxpayer primarily for sale in the course of his trade or business". Section 101 (c) (8) of the Revenue Act of 1928. (Note the absence of the phrase "to customers" present in the 1936 Act.) Under the same provision in the Revenue Act of 1932 the Board of Tax Appeals took the position that one regularly engaged in speculation in securities could by virtue of this exception deduct losses from such speculations in full, as ordinary losses. *Purdy v Commissioner*, 36 B.T.A. 572, affirmed, 102 F. 2d 331 (C.C.A. 1st). See generally 3 Mertens, Law of Federal Income Taxation (1942), Sec. 22.06.

Sess., p. 19 (1939-1 Cum. Bull. (Part 2 496)), referring to this exception, explained that:

Traders or other taxpayers who buy and sell securities for investment or speculation, whether or not on their own account, and irrespective of whether such buying or selling constitutes the carrying on of a trade or business, are not regarded by your committee as dealers in securities within the meaning of this rule, and are not given exemption.

For similar statement by the House Committee see H. Rep. No. 708, 72d Cong., 1st Sess., p. 13 1939-1 Cum. Bull. (Part 2) 457).

In the Revenue Act of 1934, c. 277, 48 Stat. 680, the principle embodied in Section 23 (r) of the 1932 Act was given general application. Subsection (r) was eliminated and the provisions governing losses from sale of capital assets were broadened to cover that and additional ground by enactment of Section 117 of the Revenue Act of 1934 (carried over without change in the Revenue Act of 1936 applicable here). Under this section the period of ownership of property was not material to its classification as a capital asset.

Losses from the sales of all "capital assets" were deductible under Section 117 (d) of the Revenue Act of 1934 only to the extent of gains from such sales plus \$2,000, hence special provisions for losses from sales of securities were superfluous. That the exceptions from this principle enumerated in Section 117 (b), defining

"capital assets", were not intended with respect to securities to enlarge on the exemption for dealers in securities under Section 23 (r) of the Revenue Act of 1932 is readily demonstrable. The exclusion in Section 117 (b) from the definition of capital assets of "stock in trade or other property of a kind which would properly be included in the inventory of the taxpayer on hand at the close of the taxable year" clearly does not include securities held by an investor or a speculator. The regulations under successive revenue acts included "dealers in securities" within the rule permitting the use of inventories in reporting income and *expressly excluded* investors and speculators therein.⁷ The validity of this regulation is beyond question and rests upon a well settled distinction between dealers on the one hand and investors or speculators in security on the other. *Schafer v. Helvering*, 299 U. S. 171; *Vaughn v. Commissioner*, 85 F. 2d 497 (C.C.A. 2d); *Trading Associates Corporation v Magruder*, 112 F. 2d. 779 (C.C.A. 4th).

Nor does the final clause of subsection (b), "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" include securities

(7) Regulations 74, Article 105, under the Revenue Act of 1928; Regulations 77, Article 105, under the Revenue Act of 1932; Regulations 86, under the Revenue Act of 1934, Article 22 (c) (5). The same provision appears in Regulations 94, issued under the Revenue Act of 1936, Section 22 (c)-5, *supra*.

held by investors and speculators. The language "primarily for sale to customers in the ordinary course of business" clearly connotes a merchant or a dealer as distinguished from a speculator or investor.

The phrase "for sale to customers", under the regulations above referred to, had for several years prior to 1934 been the indicia for determining whether a taxpayer held securities as a dealer on the one hand or as a speculator or investor on the other. *Seeley v. Commissioner*, 77 F. 2d. 323 (C.C.A. 2d). (See Regulations 94, Article 22 (c)-5, *supra*—the language is the same as that used in earlier regulations.) The same phrase appeared in the committee report on Section 23 (r) of the 1932 Act., above referred to, in making the same distinction.⁸ That

(8) S. Rep. No. 665, 72nd Cong., 1st Sess., p. 19 (1939-1) Cum. Bull. (Part 2) 496):

The exemption from the restrictions of these provisions provided for in the House bill is retained in the case of a dealer in securities (i.e., a merchant of securities whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities at wholesale and their resale to customers); in the case of losses sustained in connection with transactions with customers in the regular course of business.

The distinction between such a dealer in securities and an investor or speculator is made in that portion of the committee report set out in the text, *supra*.

Congress appreciated the meaning of the phrase cannot be gainsaid.

In fact, the conference committee report on the 1934 Act explains that the phrase "to customers" was inserted in the last clause of Section 117 (b) at the behest of the Senate "thus making it impossible to contend that a stock speculator trading on his own account is not subject to the provisions of section 117".⁹ H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 22 (1939-1 Cum. Bull. (Part 2) 627. The basis for the committee's confidence was of course the judicial construction given that language in the regulations referred to and the obvious proposition that if property is held primarily for sale to customers in the ordinary course of business it could not be primarily held for any other purpose, i. e., speculative profit. In other words, the language used ("property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business") embraces only merchants or dealers, i.e., those whose profits represent the middleman's charge, and no others. Additional support for this view, if any is needed, lies in the fact that a special provision was deemed necessary to exempt certain types of banks investing in bonds from the operation of Section

(9) Absence of that phrase had prompted the Board of Tax Appeals to hold under the Revenue Act of 1932 that securities held by a speculator were not "capital assets". See fn. 6, *supra*.

117 (d). Thus a trust company not within the terms of this special exemption was held subject to Section 117 with respect to investment losses in *Magruder v Safe Deposit & Trust Co. of Baltimore*, 121 F. 2d 981 (C.C.A. 4th).

From the foregoing it is clear that the exception in Section 117 (b) for property held primarily for sale to customers in the ordinary course of business extends only to dealers or merchants and that securities held by an investor or speculator therein are classed as capital assets subject to the limitation of Section 117 (d) for loss deduction purposes. In light of this the decision of the District Court is unsupportable. The evidence adduced before it entirely failed to establish that the taxpayer was a dealer in securities and on the contrary revealed that the securities sold in 1936 and 1937 were held by it as investment or speculative property.

The president of the taxpayer, appearing as the only witness, testified that from \$200,000 to \$300,000 worth of securities were bought and sold annually. (R. 109-110.) These figures are substantially higher than the activity reflected in the income tax returns. (R. 52-53, 88-89.) The return for 1936 showed also that the taxpayer sold stock held by it in that year in only eight transactions. (R. 52.) In describing the purchasing procedure the witness explained that for listed securities he followed the stock market every day "and when I find something

that looks reasonably well to buy, or if I have something that looks well to sell, I do buy or sell as I see fit." (R. 110.) Unlisted securities he bought "if I feel that the market justifies my buying I buy them; if I feel it justifies selling I sell them." (R. 111.) He testified further that many brokers solicited the taxpayer's business and that many of his transactions took place through such brokers. (R. 111-112.) In generalizing on the manner of the business conducted the president stated that "No. [The taxpayer never had anything it would not sell if profit was to be made.] Of course, we don't want to, but we did sell at a loss. We never salt it [securities] away, put it in a safe deposit box and say, 'We will never look at it again', saying it is a good investment. That wasn't the idea of the company". (R.116.) At the time of the trial the District Court characterized the taxpayer as a business where "he [the taxpayer's president] sought to make money as a trader for his own account, buying from the man who had to sell at a disadvantage, for reasons of his own, and selling, and the man who wasn't as good a buyer as Mr. Farrell was the seller". (R. 115.)

This testimony and the District Court's summation thereof would without more indicate the taxpayer was engaged in speculation exclusively with respect to its securities. The taxpayer's president also testified, however, that its securities were always purchased outright rather than on margin. (R. 112, 115.) Moreover, he testi-

fied further that all the securities sold in 1936 had been purchased more than four years before the time of sale. (R. 122.) (The securities sold in 1937 with two exceptions had been purchased during that or the preceding year. (R. 89.))

The income tax returns for 1936 and 1937, introduced into evidence as the taxpayer's exhibits, show that the only income from the taxpayer's securities business for those years consisted of dividends on stock in substantial amounts—\$27,145.09 for 1936 (R. 49, 51), and \$25,188.70 for 1937 (R. 84, 85). The taxpayer's only other significant income was from rentals. (R. 51, 85.)

These several attributes of the taxpayer's securities business would indicate that it had a substantial investment aspect and the taxpayer's president admitted as much. (R. 120.) The fact that the securities sold in 1936 had been held more than four years certainly corroborates that admission.

On the basis of the evidence adduced there may be room for doubt whether the taxpayer's principal trading in securities was for investment or speculation. The evidence does clearly establish, however, that the taxpayer was an investor *and* speculator for the tax years involved *and not* a dealer or merchant in securities. The taxpayer's securities were not held as a "stock in trade" primarily for sale to customers in the ordinary course of business for the regular profit to be gained from such sale, as a charge for

the middleman's service performed. Cf. *Schafer v Halvering*, 299 U. S. 171. Those securities were held rather for dividends and for speculative profits on resale. Hence, the securities sold were capital assets under Section 117 and subject to the limitation imposed on deductibility of losses from sales of such assets. The finding by the District Court to the contrary is not supported by the record and involves complete rejection of the well settled presumption in favor of the validity of the Commissioner's determination.

The case of *Commissioner v. Burnett*, 118 F. 2d 659 (C.C.A. 5th), above referred to, is authoritative here. There the taxpayer had been engaged in buying and selling stocks and commodities on her own account through brokers on margin. She engaged in several hundred transactions annually involving many thousands of dollars. The Circuit Court of Appeals sustained the decision of the Board of Tax Appeals and held that the securities and commodities were not held as property "primarily for sale to customers in the ordinary course of his [her] trade or business" but were instead capital assets within the meaning of Section 117. Nor is the case to be distinguished here on the ground that the taxpayer there bought on the margin. Speculation by outright purchase is quite as feasible as the Board of Tax Appeals appreciated in *Farr v. Commissioner*, 44 B.T.A. 683. There the taxpayers were authorized to buy and sell securities. They

bought outright and sold large amounts of securities on their own account for speculative profits. Many of the sales were made to regular customers of the brokerage firm they also operated. The Board held on the authority of *Commissioner v. Burnett, supra*, that the taxpayers were dealers in securities so that losses from the sales of their securities were subject to Section 117.

As seen above, the crucial issue here is whether the taxpayer is a dealer in securities. Therefore the decisions in *Schafer v. Helvering, supra*; *Vaughan v Commissioner, supra*; *Seeley v. Commissioner, supra*; and *Trading Associates Corporation v. Magruder, supra*, holding that extensive investment or speculation in securities on an outright purchase basis does not entitle a taxpayer to classification as a dealer in securities, are likewise authoritative here.

On the basis of reason and authority it must be concluded that the taxpayer was not a dealer in securities for the tax years in question so that its securities must be classed as capital assets under Section 117 subject to the limitation on deductibility of losses on sales imposed by that section.

II

**THE SURTAXES ON UNDISTRIBUTED PROFITS
AND PERSONAL HOLDING COMPANY
INCOME ARE CONSTITUTIONAL**

There remains only to be considered the taxpayer's contention that application of Section 117 to sustain the undistributed profits tax assessed against it for 1936 and the personal holding company tax for 1937 is violative of the Federal Constitution.

In *Helvering v. Northwest Steel Mills*, 311 U.S. 46, and *Crane-Johnson Co. v. Helvering*, 311 U.S. 54, the Supreme Court sustained the validity of the surtax on undistributed profits imposed by Section 14 of the Revenue Act of 1936. Similar constitutional considerations are pertinent with respect to the surtax on undistributed personal holding company income, and the validity of that species of income tax was sustained in *Foley Securities Corp. v. Commissioner*, 106 F. 2d 731 (C.C.A. 8th). Cf. *Helvering v. Nat. Grocery Co.*, 304 U.S. 282. Rejected in *Helvering v. Northwest Steel Mills*, *supra*, were charges that a tax on undistributed profits is not an income tax and that it interferes with state control over the internal affairs of corporations in violation of the Tenth Amendment. Hence, consideration need not be given here of similar allegations in the taxpayer's complaint. (R. 5, 7.)

Nor is there any substance in the allegation (R. 4) that the taxpayer had no income for either 1936 or 1937 so that exaction of a tax on undistributed profits for those years violated the Fifth Amendment. The returns filed by the taxpayer showed net income of \$22,541.85 for 1936 (R. 54, 56), and \$15,113.50 for 1937 (R. 85), and as seen above the taxes assessed and paid were based on that statutory net income—not on some generalized concept of profit or earnings. The net income reflected, it is true, application of Section 117 to limit losses deductible from the taxpayer's sales of securities to \$2,000. As seen above, however, that was required by the terms of the Revenue Act of 1936 in ascertaining net income. Section 117, it should be noted, permits losses from the sale of capital assets to be deducted in full from capital gains in determining net income. The \$2,000 limitation on deductibility of such losses is applicable only with respect to deduction of such losses from ordinary income. It was simply the taxpayer's misfortune to have sustained net losses on its sales of capital assets for the years in question.

Essentially, the taxpayer's allegation invoking the Fifth Amendment is a contention that losses from the sale of capital assets must, under the Constitution, be deducted in full from all other income before any tax on any income can be validly assessed. The fallacy in this proposition is, of course, the notion that Congress under the Sixteenth

Amendment can tax only an accounting species of "net income". None of the income tax statutes since the adoption of that Amendment has provided for deduction of all losses and expenses in ascertaining taxable net income. Thus there is an infinite variety of situations in which a taxpayer may sustain a net loss in the accounting sense but nevertheless have net income within the meaning of the revenue acts subject to tax. The validity of statutory disallowance of particular items has been approved by the Supreme Court in numerous cases. *Brushaber v Union Pac. R. R.*, 240 U.S. 1; *Stanton v. Baltic Mining Co.*, 240 U.S. 103; *Tyee Realty Co. v. Anderson*, 240 U.S. 115. In more recent times the Court has stated simply that deductions are matters of Congressional grace. *New Colonial Co. v. Helvering*, 292 U.S. 435, 440; 4 Mertens, Law of Federal Income Taxation (1942), Sec. 25.03. Limitations on deductions of capital losses from ordinary income have been an integral part of our revenue acts since 1924 and cannot now be questioned. *United States v. Pleasants*, 305 U. S. 357. So here, in conformity with that principle, as the taxpayer received statutory net income for the tax years in question, it is subject to tax thereon without regard to its nondeductible capital losses.

Finally, it may be observed that the taxpayer can complain of no hardship resulting from imposition of the surtaxes for 1936 and 1937 on undistributed profits. As seen above, the corporation had net income in those years

within the meaning of the revenue acts. Moreover, its balance sheets showed earned surplus and undivided profits from earlier years remaining at the close of 1936 of some \$225,709.31 (R. 53) and \$208,899.19 as of the close of 1937 (R. 88). The surtaxes on undistributed net income could have been escaped entirely by distributions of undivided profits from prior years in the amount of the statutory net income for the tax years in question. In much stronger cases, from the standpoint of sympathy for the taxpayer, the surtax on undistributed profits imposed by Section 14 of the Revenue Act of 1936 was sustained in *Helvering v. Northwest Steel Mills, supra*, and *Crane-Johnson Co. v. Helvering, supra*, where deficits from prior years prevented the corporations from declaring dividends and escaping the tax.

CONCLUSION

The decision of the District Court was erroneous and therefore should be reversed.

Respectfully submitted,

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January, 1943.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CHINOOK INVESTMENT COMPANY,
a corporation,

Appellee.

APPELLEE'S BRIEF

On Appeal from the District Court of the United
States for the District of Oregon.

S. J. BISCHOFF
ROBERT T. JACOB
Public Service Building
Portland, Oregon
Attorneys for Appellee

FILED

MAR 3 - 1943

PAUL P. O'BRIEN,
CLERK

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If the Acts in question are construed so as to preclude the deduction of the total loss in determining the existence of undistributed profits and are not limited to profits in fact, then the Acts as applied to appellee are unconstitutional because (a) they do not impose a tax on income but on capital and (b) they are so arbitrary as to violate the due process clause of the Constitution.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

CHINOOK INVESTMENT COMPANY,
a corporation,

Appellee.

APPELLEE'S BRIEF

On Appeal from the District Court of the United
States for the District of Oregon.

APPELLEE'S STATEMENT OF THE CASE

Chinook Investment Co. is a corporation organized in 1911 under the laws of the state of Oregon

“To own, buy, sell, or to acquire by sale, trade or exchange, bonds, notes, mortgages and other evidences of indebtedness or shares of stock in other corporations, and to exercise while the owner thereof all the rights, powers and privileges, including the right to vote thereon, that a natural person being owner thereof might, could or would exercise, negotiate loans and transact any other business usually trasacted by a credit or finance company.” (Plff’s Exh. 13, p. 101.)

It engaged in that business continuously thereafter to and including the years 1936 and 1937 here in question. At the time here in question the stock was owned as follows: Robert S. Farrell, Sr., 215, Robert S. Farrell Jr. 119, Marion Kingary 120, Susan M. Farrell 6, Frederick Kingary 10, Susan Kingary 10, Joan Farrell 10, and Sally Farrell 10 shares. The company was organized and operated for profit. (Tr. p. 107) Robert S. Farrell, Sr., acted as the buyer and seller of practically all stocks, bonds, and real estate and Robert S. Farrell, Jr., was manager of the company, looking after the real estate, renting and securing tenants, making repairs and other matters connected with the real estate. The other stockholders are a daughter and grandchildren. (Tr. p. 108) The corporation bought and sold securities at private sale, “at random”, “over the counter”, and “listed securities”. It maintained an office for the transaction of the business of the company (p. 109). It bought from \$200,000.00 to \$300,000.00 worth of securities each year and sold about the same amount. It kept all the cash revolving in the purchase and sale of securities (p. 110). Mr. Farrell, Sr., kept in close touch with the market, “belonged” to Babson & Company, subscribed to financial papers

and periodicals, watched the stock market every day and “when I find something that looks reasonably well to buy or if I have something that looks well to sell I do buy or sell as I see fit.” (p. 110) It had a number of unlisted securities, some in local companies. When it felt that the market justified, it bought or sold stocks. In making such sale or purchase it went to brokers. “often to outsiders” and ask them if they wish to buy what it had to sell. He knew the stockholders of these companies, attended annual meetings (p. 111). He conferred with them on prices. He made purchases direct from the owners of stock (p. 111). He was solicited frequently by brokers who had securities to buy or sell. These were for direct sales and not on any exchanges. They never bought or sold on margin (p. 112). All the purchases were for cash (p. 115).

“We never salt it (securities) away, put it in a safe deposit box and say ‘We will never look at it again,’ saying it is a good investment. **That wasn’t the idea of the company.**

Q. THE COURT: In fact you figured on getting part of your living out of what you could make in your trading, didn’t you?

A. That is what I make my living at.” (p. 116)

In its income tax returns the appellant described its business as “bonds, stocks, real estate”. (Tr. p. 51) The bundle of invoices of purchases and sales of securities (Plf’s Exh. 14-a and 14-b) were a part only of the invoices covering the transaction for the several years preceding the tax years in question. They are not a complete record of all the securities bought and sold. Appellee was unable to produce all of them, because some had been lost in moving. They disclose continu-

ous course of business in a variety of securities. The purchases were made in small and large lots. They were of low and high price and varied in every conceivable way.

It is conceded that appellee had no income in the years 1936 and 1937 subject to normal income tax.

In 1936 the company sustained a loss of \$43,535.02 from the sale of securities which produced a net loss for the year resulting in a reduction of its surplus account by \$26,935.64 (Tr. p. 26). The Commissioner of Internal Revenue assessed a surtax on "undistributed profits" of \$4071.89 (tax and accrued interest) based on the contention that the loss was a "capital loss" and therefore deduction could only be taken to the extent of \$2000.00. Appellee paid the tax and sued for a refund. This is the basis of the first cause of action.

In 1937 the company sustained a loss of \$20,652.79 from the sale of securities, which produced a net loss for the year, resulting in a reduction of its surplus account by \$16,810.12 (Tr. p. 27). The Commissioner assessed a surtax on "undistributed profits" of \$5781.04 (tax and accrued interest) based on the contention that appellee was a "personal holding company" and the loss was a "capital loss" and therefore deduction could only be taken to the extent of \$2000.00. Appellee paid the tax and sued for a refund. This is the basis of the second cause of action.

There is no dispute as to the figures found by the court below (Tr. pp. 26-27).

The only issues are those stated in the following statement of "questions involved":

THE QUESTIONS INVOLVED

I.

Were the losses “capital losses” within the meaning of **Section 117(b), Revenue Act of 1936** (applicable to both causes of action)? Appellee contends there is substantial evidence to support the finding of fact of the court below that appellee held the securities primarily for sale to customers in the ordinary course of its trade or business and hence they were not capital assets. The finding is not subject to review.

If this contention is sustained, then all other questions become moot.

II.

Even if they were “capital losses” they are deductible in full for the purpose of determining the existence of “undistributed profits” because there must be **profits in fact** available for distribution to stockholders as dividends as defined in **Section 115 of the Revenue Act** and not merely “statutory net income”. This contention is applicable to both causes of action and if sustained, all other questions become moot.

III.

Even if they are “capital losses” and deductible only to the extent of \$2000.00, there are no “undistributed profits” in either year because the deduction of the “dividends received credit” (**Section 26(b)**) results in no “undistributed profits”.

IV.

As to the year 1937 (second cause of action) appellee was not a personal holding company because the

revenue from rents was more than 50% of the total "gross income" (Section 353, Revenue Act of 1937) and therefore does not come within the definition of personal holding company (Section 352).

V.

If Section 14 of the Revenue Act of 1936 (undistributed profits tax) and Sections 351 to 359 of the Revenue Act of 1937 (personal holding company act) are construed to mean that a tax on "undistributed profits" must be imposed on appellee even though it has no **profits in fact** in the current tax year available for distribution as dividends to stockholders, then as so construed the act is unconstitutional because it is not a tax on "income" (16th Amendment) but a penalty for failure to distribute capital.

POINT I.

The losses did not result from the sale of "Capital Assets". Appellee was therefore entitled to a deduction of the entire loss and was not limited to a deduction of \$2000.00 under Section 117(d) Revenue Act of 1936).

SUMMARY OF THE ARGUMENT

A.

The question whether the securities were "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" was determined by the court below as a question of fact and is therefore not subject to review.

B.

The taxpayer does not have to be a “dealer or merchant of securities” as defined in Regulation Art. 22 (c)(5) in order to come within the purview of the last clause of **Section 117(b)**. The true test is whether the securities were purchased and held with the intention of selling the same and realizing a profit therefrom as distinguished from a purchase for the purpose of deriving revenue (interest or dividends) therefrom.

C.

If the business of buying and selling securities is carried on regularly and the transactions are continuous and frequent as distinguished from isolated or casual, then the securities dealt in are not “capital assets” within the definition of Section 117(b).

D.

Anyone who can be found to buy property, including a broker who buys for an undisclosed principal, is a “customer” within said section.

E.

The definition of “dealer” or “merchant” of securities in Art. 22(c) (5) cannot be read into and made a part of Sec. 117(b) because the definition in Art. 22 (c)(5) is made “for the purpose of this rule” only. It is not made a part of Sec. 117(b) by reference or otherwise. The former defines the **status of the taxpayer** while the latter defines the status of the **assets**.

F.

The term “business” as used in Sec. 117(b) is that which occupies the time, attention and labor of men

for the purpose of a livelihood or profit.

G.

Appellee's activities were not limited to doing merely what was necessary from an investment point of view such as merely collecting dividends and interest. It was an active and continuous buyer and seller and engaged in all activities incident thereto as a means of earning profits for its stockholders.

H.

The length of time the securities are held is not decisive, if they were acquired and held primarily for resale.

ARGUMENT

Appellant sustained a loss of \$43,535.02 (not questioned) in 1936, and \$20,652.79 (not questioned) in 1937 from the sale of securities. It is conceded that if these securities were not "capital assets" as defined in **Section 117(b) of the Revenue Act of 1936** (applicable to both causes of action), then appellee was entitled to deduct the losses in full and there were no "undistributed profits" subject to the penalty in either year.

The question then presents itself were these securities "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business?"

This calls for an inquiry into the taxpayer's trade or business and the purpose and intent with which the securities were purchased and held. These are primary questions of fact to be determined by an ap-

praisal of all the facts and circumstances developed by the evidence and the inferences to be drawn therefrom. The court below made findings of fact which bring the appellee within the definition of the clause quoted above. (Tr. pp. 27-28.)

This court has held that the precise question here involved was a question of fact. That the finding of the court below, if supported by substantial evidence, is not subject to review.

In **Richards v. Commissioner**, 81 Fed. (2d) 369 (9th Cir.), this court held:

“The Commissioner contends that the real property in question was not a capital asset, and the issue presented to the Board was whether or not the real property was ‘held by the taxpayer primarily for sale in the course of his trade or business.’ The determination of this issue is the ultimate fact. (Citations.)”

The Board determined the ultimate fact to be:

“. that the lots were held by the petitioner primarily for the sale in the course of his business.

“We are limited therefore to an examination of the record to ascertain whether or not there is any substantial evidence to sustain the finding.” (Citing many cases.)

It has been repeatedly said that it is the province of the trial court to determine the facts and to draw the inferences therefrom.

Under the **Richards case** decided by this court the question is foreclosed by the finding of fact made by the court below and is decisive of this case.

Appellant maintains that the question is reviewable as one of law or mixed question of law and fact and cites the **Boeing case**, 106 F. (2d) 302. That case does not overrule the **Richards case**. This court merely held in the **Boeing case** that the **Richards case**, and others, "must be read in the light of the more recent expressions of the final court". This had reference to the cases of **Helvering v. Ranking**, 295 U.S. 123, and **Helvering v. Tex-Penn Co.**, 300 U.S. 481. These two cases merely clarified the distinction between "primary", "evidentiary" or "circumstantial facts" which "must be taken as established" and the "ultimate finding" which is a "conclusion of law". Applying this test to the case at bar, the findings which were quoted above, are all upon facts from which the court below made its "conclusion of law" or "ultimate finding" (Tr. p. 30).

All of the details narrated in the findings of fact are primary, evidentiary, and circumstantial from which the ultimate finding or conclusion was drawn. It was the sum total of these facts and the inferences drawn therefrom that led to the determination (ultimate conclusion) that the securities were not "capital assets".

We submit that there is ample evidence in the record to support these findings and that the findings support the conclusion.

Appellant's analysis of the evidence as to the nature of appellee's business ignores many important factors disclosed by the evidence. It ignores the fact that the taxpayer is a corporation which was organized for

the express purpose, among others, of buying and selling securities. It was engaged in that business for over thirty years.

Mr. Farrell, Sr., the President, devoted practically all of his time to that portion of the business which had to do with the purchase and sale of securities. His son handled the rental of real property and offices were maintained for the conduct of the business. They made a living out of trading in securities. (Tr. p. 116) They did not buy securities to salt away as an investment. (Tr. p. 116) They bought and sold for cash only. Mr. Farrell solicited buyers as well as sellers. They frequently bought and sold from hand to hand in private transactions. He kept the capital of the company constantly revolving in the purchase and sale of securities. The capital was turned over about once a year. This type of business was continuous during the years they were in business. The transactions were not intermittent or occasional but were continuous and regular. They did not speculate on margin. Mr. Farrell participated in the management and activities of some of the corporations in which it held stock. He kept in close continuous touch with the market and was a subscriber to the financial publications and services. He watched the stock market for the purpose of enabling him to conduct the business of buying and selling securities. Mr. Farrell testified "we always bought and sold for a profit, tried to do so". (Tr. p. 116)

Investment "was not the idea of the company". (Tr. p. 116)

The sheaf of invoices in evidence, representing purchases and sales, are not all of the invoices covering all of their transactions. They were all that could be found, but there are enough in evidence to demonstrate the activities of the corporation, the regularity of its transactions, the variety of transactions and negative the idea that securities were being purchased and held merely as investments.

The evidence adduced fulfills all of the tests which have been applied by this and other courts as well as by the Board of Tax Appeals for determining that securities were held primarily for sale to customers in the ordinary course of business.

Appellant's failure to appreciate the significance of the evidence is due to the fact that it has attempted to apply tests which are not contemplated by **Section 117(b)**. Appellant's entire argument is an attempt to draw this case into an ambit of **Regulations, Article 22(c)(5)** following **Section 22(c)** of the Revenue Act instead of the tests contemplated by **Section 117(b)**. All of the so-called legislative history that is referred to in appellant's brief except the brief excerpt on Page 18 are concerned with the statute and Regulations under **Article 22(c)** and other provisions of the Revenue Act.

Appellant insists throughout that in order to come within the exception of the last clause of **Section 117(b)** the taxpayer must be a "dealer" or a "merchant" of securities as the term is defined in **Regulations, Article 22(c)(5)**, and that the Act must be interpreted in

accordance with said Regulations. This is the backbone of appellee's argument.

We reproduce here in juxtaposition Section 117(b) and Regulations, Article 22(c)(5) for the purpose of comparison.

Section 117(b)

"(b)—**Definition of capital assets**—For the purposes of this title, 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

Article 22 (c)-5.

"Art. 22 (c)-5. **Inventories by dealers in securities. For the purpose of this rule** a dealer in securities is a **merchant** of securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a **merchant** buys securities and sells them to customers with a view to gains and profits that may be derived therefrom. If such business is simply a branch of the activities carried on by such person, the securities inventoried as here provided may include only those held for purposes of resale and not for investment. **Taxpayers who buy and sell or hold securities for investment or speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade or business, and officers of corporations and members of partnerships who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule.**"

The two cannot be read together for the following reasons:

First, they deal with entirely different subject matters. The **regulation** deals with the right to use inventories reporting the taxpayer's operations. The **act** defines capital assets.

Second, the regulation deals with the status of the **taxpayer** (whether "dealer" or "merchant"). The act deals with the status of **assets**.

Third, the regulation specifically provides that it is promulgated "**for the purpose of this rule**" thus limiting its application. The act creates a definition "**for the purpose of this title**". Title has reference to the entire body of income tax law.

Fourth, the regulation includes specific characteristics such as "merchant of securities", "established place of business". The act does not include these characteristics.

Fifth, the regulation specifically excludes from the definition of dealers in securities those who buy and sell or hold securities for "**investment or speculation**", "irrespective of whether the buying or selling constitutes carrying on of a trade or business." The act does not exclude the taxpayer who buys, sells or holds securities for "**investment or speculation**". The phrase "irrespective of whether such buying or selling constitutes carrying on a trade or business" in the regulation is highly significant and important. This particular language was not included in the 1928 regulation. The phrase was undoubtedly added in recogni-

tion of the fact that one can be regularly engaged as a dealer in securities as a business or trade even though he buys and sells for investment or speculation. In order to remove the investor and speculator from operation of that definition specific amendment had to be made and was made.

But Section 117(b) does not exclude the **investor or speculator** and so the sole test remains the purpose to hold **primarily for sale**.

Sixth, If the Congress intended that the definition in Section 117(b) should be co-extensive with the definition in Article 22(c)-5, or that the former should be interpreted in accordance with the latter, it would have incorporated the same language which had acquired fixed meaning or would have incorporated the same by appropriate reference. In failing to insert an amendment in 117(b) corresponding to the amendment of Article 22(c)-5 which includes the phrase "irrespective of whether such buying or selling constitutes the carrying on of a trade or business", with respect to investors and speculators, there was manifest recognition that the two provisions are not related to each other.

Regulations, Article 22(c)(5) does two things in connection with the definition of dealer of securities. It first defines who shall be a "dealer" or a "merchant" and then specifically says who shall not be deemed a "dealer" or "merchant" "within the meaning this rule". There is no comparable language in **Section 117(b)** which is the applicable statute. Very

comprehensive language is used. It does not deal with securities alone as does the Regulation. It deals with "property", "all" property. The Regulation deals with a specific kind of business, to-wit: the security business. **Section 117(b)** deals with "his" trade of business. The Regulation excludes the investor and speculator even though investment and speculation is carried on as a business. **Section 117(b)** does not exclude either.

It is a universal rule of statutory construction that when a statute deals with a specific subject matter and makes its own definitions, that it cannot be extended by implication to cover other matters, particularly when they are specifically dealt with elsewhere. The rule of *eiusdem generis* makes it impossible to read into **Section 117** the definitions and interpretations which appellant seeks to incorporate.

Appellant attaches great significance to the insertion of the words "to customers" and "ordinary" by the 1934 amendment. It is claimed that these words require that 117(b) should be construed as defined in Regulation 22(c)(5). But this Court and the Board of Tax Appeals have held otherwise in decisions interpreting 117(b) as amended.

In **Ehrman v. Commissioner of Internal Revenue**, 120 F. (2d) 607-610 (9th Cir.) this court said:

"From the cases it would appear that the facts necessary to create the status of one engaged in a 'trade or business' revolve largely around the **frequency** or **continuity** of the transactions claimed to result in a 'business status.' We see no reason

for departing from these decisions and now holding that the fact that property is sold for the purposes of liquidation forecloses a determination that a "trade or business" is being conducted by the seller. See also *Welch v. Solomon*, 9th Cir., 99 F. (2d) 41."

"The taxpayers call attention to the fact that the statute involved was **amended** in 1934 by adding the words 'to customers' and 'ordinary'. It is urged that the addition of these words indicate an intention by Congress to exclude from taxation as ordinary gains sales such as the ones with which we are here concerned. We do not agree. If, as we have held the fact to be here, the taxpayers were in the 'trade or business' of real estate subdivision, then certainly the sales of lots were to 'customers' in the 'ordinary' course of that business."

This court thus held applicable the tests applied by this court in the **Boeing** (106 Fed. (2d) 659) and **Richard's** (81 Fed. (2d) 369) cases.

In the **Richard's** case the emphasis was placed on the "comprehensive" word "held" and so this court ruled that even though the property was not originally purchased for resale, it was not capital assets if thereafter "held" for resale.

In the **Boeing** case this court held that the question as to the status "revolve largely around the **frequency** or **continuity** of the transactions." It is not a question whether the taxpayer holds for "investment", for the court quoting from the **Miller** case, 102 Fed. (2d) 476, said:

"If the transactions concerning his investments are **substantial** and **frequent** as distinguished from occasional or isolated,"

then the taxpayer comes within the exception and so it was there held, applying the test of "regularity" and "continuity" as distinguished from "casual" transactions that, the gains were not "capital".

The Boeing case involved the tax for 1934 and the statute as amended.

Under the **Boeing** and **Miller** cases the test is not whether the property was held for "investment". Even if investment if the "taxpayer's investment activities" stand the test of continuity and regularity so that investment was a business, the exception applied.

In support of the view the court also referred to **Kales vs. Commissioner**, 101 Fed. (2d) 35 (6th Cir.), and **Kane v. Commissioner**, 100 Fed. (2d) 382 (2nd Cir.).

The recent case of **Black v. Commissioner**, 45 B.T.A. 204-209, dec. Sept. 1941, involved the application of 117(b) as amended. The taxpayer was engaged generally in the real estate business consisting primarily of subdividing tracts of land. The board found the following facts:

"Petitioner bought, developed and traded in real estate for sale at a profit. He did not buy real estate to hold as an investment. His plan of operation was to buy property and develop it and rent it, if necessary, while awaiting sale so as to show an income and then sell it when he could."

He developed a number of subdivisions through a corporation and dealt principally in residential property but also bought and sold business property. During the tax year in question he had four properties

which he had acquired from one to ten years prior thereto. In 1924 he traded a farm property for a building known as the Franklin Building, giving mortgages back on the building. There was a lease on the building when he acquired it but after some two or three years the tenant vacated and the building remained vacant. The mortgages on the building were foreclosed, and as the result thereof the taxpayer sustained a loss in 1936. The Commissioner of Internal Revenue disallowed the loss except to the extent of \$2000, treating the building as a capital asset. The Board of Tax Appeals held:

“It is obvious from the record that the Franklin Building was acquired by petitioner and Gould for the purpose of selling it and was continuously held for sale from the time it was purchased until it was lost on foreclosure sale.

“Where, as here, one is regularly engaged in the business of buying and selling real estate, as was petitioner, **any person who can be found to buy such property is a customer**, as that term is ordinarily understood, and where such property is held for sale under such circumstances it must be deemed to be held for sale to customers within the meaning of the statute.”

The reasoning employed by the board as late as September, 1941, and in the face of the **Farr and Burnett** cases with which the board was undoubtedly familiar, clearly dissipates the contention of the appellant in this case that the 1934 amendment made a radical change so as to bring only dealers and merchants within the purview of the last class of **Subdivision (b)**. The emphasis was placed by the board upon the intent with which the property was acquired and held. If it

was bought for the purpose of resale to make a profit thereon, then it was "held" primarily for sale to customers".

In *Goodman v. Commissioner*, 40 B.T.A. 22, the taxpayer purchased a tract of land, subdivided it into lots for the purpose of selling the same to such purchasers as may be found. Part of the lots were sold and then the project became inactive and remained so for several years. The taxpayer then surrendered the remaining property to the holder of the mortgage in satisfaction of the indebtedness. The taxpayer also paid some \$900.00 to boot to be relieved of the mortgaged debt. He took a deduction of the loss sustained upon the disposition of the property. The loss was disallowed by the Commissioner on the ground that the property was a capital asset. The case also involved 117(b) after the 1934 amendment.

Upon these facts the Board held that the property was "held primarily for sale to customers in the ordinary course of the taxpayer's business", notwithstanding the fact that the property remained "inactive" for a long period of time. The delay was explained by a slump in the real estate market. The Board said:

"The original purpose, however, remained. It cannot be that business adversity of itself converted it into a purpose of investment, nor did the demand of the mortgagee. Those seem to us to have been disappointing incidents of the primary purpose of ordinary business—no less so than a failure to succeed in the grocery business."

It is argued that to be entitled to take a deduction of the entire loss sustained from the sale of securities, one must be a "dealer" or "merchant" of securities. The idea urged is that the taxpayer must be a dealer in the very kind of property which resulted in loss. This idea was rejected by the Board of Tax Appeals in **Forston vs. Commissioner of Internal Revenue**, 47 B.T.A. Case No. 26, decided June 23, 1942, involving the statute as amended. (See text of decision, Appendix p. 81.)

In **Hercules Motor Co.**, 40 B.T.A. 999, the question also arose under the statute as amended and it was held that trade acceptances taken in payment of merchandise and later sold at a loss were not capital assets. (See text of decision, Appendix page 82.)

The Commissioner of Internal Revenue has not been consistent in his interpretation of the act in question. His views seem to depend upon which side of the fence he is on. In the **Richards case** when the Commissioner was contending that the transaction came within the exception he advanced the same interpretation that we do here. We quote from the Commissioner's brief filed in this court in that case, (No. 7835) as follows:

"In the recent case of **Roney v. Commissioner**, 67 F. (2d) 165 (C.C.A. 4th), certiorari denied, 290 U.S. 705, the court pointed out that, even though slight, the activities of the taxpayer were continuously carried on between the years 1922 and 1925, and concluded that (p. 166) 'very slight activity' constitutes 'doing business' when the end is profit."

This was the test he wished to have applied. This Court adopted the Commissioner's views in the **Richards case** and did so largely upon the authority of three cases decided by the Supreme Court of the United States which adopted a very comprehensive definition of the term "business".

In **Flint vs. Stone Tracy Co.**, 220 U.S. 107, the first of the three cases, the Court held:

"* * * 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing **People ex rel. Hoyt vs. Tax Comrs.**, 23 N.Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.'"

In **Von Baumbach vs. Sargent Land Co.**, 202 U.S. 503, the second of the three cases cited, the Supreme Court reiterated its approval of that definition.

In **Sloan v. Commissioner**, 63 F. (2d) 666 (9th Cir.), this Court adopted this definition.

The position taken by appellant in the case at bar is diametrically opposed to that which it took in the **Richards case**.

The emphasis placed by appellant on the interpretation of the words "to customers" is unwarranted.

In **Commissioner v. Stevens**, 78 F. (2d) 713, the taxpayer was a stock broker, but in addition to buying and selling for others on commission, bought and sold stocks for its own account and "all their pur-

chases were intended for resale at a profit". In considering whether it sold "to customers" the court said:

"Another broker may well be considered a customer."

And in the **Black case**, 45 B.T.A. 204, the Board of Tax Appeals as late as September, 1941, said that

"Any person who can be found to buy such property is a customer. . . ."

In **Marsch v. Commissioner of Internal Revenue**, 110 F. (2d) 423-425 (7th Cir.), the court, after reciting the taxpayer's activities, said:

"These activities were **regular and recurrent and not those of a mere passive investor**, and show a related **continuity** of a dealer regularly engaged in the business of buying and selling real estate. **Dalton v. Bowers**, *supra*; **Kales v. Commissioner**, *supra*; and **Commissioner v. Boeing**, 9th Cir., 106 F. (2d) 305."

In **Quaker Investment Co. v. Commisisoner, B.T.A. memorandum opinion**, Docket No. 88723, April 12, 1939, the taxpayer was a corporation organized "with power to purchase, sell and deal in stocks and other securities". From the time of its inception the company was engaged in buying and selling stocks and securities. During the tax year in question it made a profit from the sale of certain stocks and sustained losses from the sale of others which it offset against the profits. The Board, in construing the language "or property held by the taxpayer primarily for sale in the course of his trade or business", held the losses deductible in full. (See text of decision, p. 82 of Appendix.)

In *Alverson vs. Commissioner of Internal Revenue*, 35 B.T.A. 482, the taxpayer was a lawyer actively engaged in the practice of law. "That was his principal business". He was also engaged in buying and selling stocks and securities for his own account. The Board in determining whether he was engaged in "any trade or business" said:

"'Any trade or business' is the broad language of the statute. We, therefore, conclude that taxpayer, in dealing on the stock exchange to the extent he was during the taxable year, was carrying on a trade or business within the meaning of the statute."

In *Fuld v. Commissioner*, 44 B.T.A. 1268, decided August 22, 1941, the Board found the facts to be that prior to 1930 the taxpayers bought stocks merely as investors and were not engaged in buying and selling of securities as a business, but they bought the securities for investment purposes.

But after 1930 they adopted a new policy. "They began purchasing in large lots . . . for the purpose of making rapid turnover . . . Fuld devoted time to the study of financial papers, attended meetings of corporations, and 'the main source of livelihood of both petitioners was from their securities transactions.'"

Upon these facts the Board made a finding of fact "beginning Oct. 9, 1930 through 1933 petitioners were engaged in the business of trading in securities", and held:

"Despite the investment status of all their activities before, the petitioners maintain that their

activities in which they were engaged under their new policy constituted the business of trading or speculating in securities. We are convinced that **they have sustained their burden of establishing this fact.** *Jackson v. United States*, 25 Fed. Supp. 613; *affd.*, 110 Fed. (2d) 574; see also *Clinton Gilbert, Jr., Executor*, 20 B.T.A. 765. The petitioners' activities were not 'limited to doing merely what was necessary from an investment point of view', and their transactions 'were substantial and frequent rather than occasional or isolated.' *Alice DePont Ortiz*, 42 B.T.A. 173. Moreover, besides devoting a large part of their time to their new activities of buying and selling securities for their own accounts, the **principal source of their livelihood resulted from such activities.** In our opinion, the petitioners' activities constituted the business of trading in securities in 1933

Therefore, we hold that the losses from the sale thereof in 1933 are **not capital losses** within the meaning of section 101 of the Revenue Act of 1932."

In *Reckford v. Commissioner*, 40 B.T.A. 900 (1939) the Commissioner took a position diametrically opposed to the position asserted in this case and was sustained by the Board of Tax Appeals. The taxpayer was the president of a large manufacturing concern. He also engaged for many years in buying and selling securities. That part of his activities tapered off very sharply from 1929 to 1934. In the years, 1932 to 1934, they were almost negligible compared to his former trading. The Board held:

" . . . In determining whether a trade or business was being carried on, a factor of more decisive importance than the volume of transactions lies in whether or not the taxpayer's market activities consisted of dealing in securities for speculative

purposes, or for investment purposes.

"Thus the court in *Kales v. Commissioner*, 101 Fed. (2d) 35, reversing 34 B.T.A. 1046, held that where the taxpayer made all decisions affecting the sale or purchase of securities and employed a bookkeeper with whom she held conferences three or four times a week, such activities were sufficient to take her out of the class of a **passive investor**; that she was **carrying on a trade or business**.

"But it has also been held that the **management of investments may constitute a trade or business**. . . ."

In *Jackson v. U. S.*, 110 Fed. (2d) 574 (9th Cir.) in determining that the taxpayer was engaged in trade or business the Court pointed out:

"This is not a case where the business activities were so limited as to be merely incidental, as held in *Lansdowne v. Commissioner of Internal Rev.*, 50 F. (2d) 56 (2 U.S.T.C. Sec. 748); *Garner v. United States*, 49 F. (2d) 993 (1931 C.C.H. Sec. 9401); and other cases cited by appellant. Here **supervisory acts were so extensive, continuous, and necessary as to constitute the doing of business under any reasonable definition of that term.**"

In *Miller v. Commissioner*, 102 Fed. (2d) 476 (9th Cir.), the Court, in considering whether the taxpayer was engaged in trade or business, said:

"The Supreme Court has defined 'business' in passing on a case under the corporation excise law, as being a very comprehensive term, embracing everything about which a person can be employed and as that which occupies the time, attention and labor of men for the purpose of a livelihood or profit. *Flint v. Stone Tracy Co.*, 280 U.S. 107, 171."

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“Other cases have recognized that though the taxpayer takes no part in the enterprises as to which he is an investor, he may nonetheless be considered to be carrying on a business if the transactions concerning his investments are substantial and frequent as distinguished from occasional or isolated.” (Citing many cases.)

“In addition to the cases cited, two Circuit Court cases have very recently been decided which applied, in ascertaining the character of the taxpayer’s investment activities, the test of the extent of those activities. We think that these two cases, taken together, establish a proper measure for the determination of whether a taxpayer’s activities are of a ‘business’ character.”

The two cases referred to are the **Kales case**, 101 F. (2d) 35, and **Kane**, 100 F. (2d) 382. In the former the court held that the taxpayer was engaged in business because her activities

“... were extensive, varied, continuous and regular”, and on this basis concluded that they constituted a business.”

In the latter case the court found from a review of the evidence that the taxpayer was merely a “passive recipient of income”. Thus we have the clean-cut line of demarcation recognized and approved by this court.

In the **Kales case**, the Court, in determining that the taxpayer was engaged in trade or business said:

“That ordinarily a person is engaged in business when he devotes his time and energy to the buying and selling of securities there can little doubt, and the Supreme Court has, inferentially at least, recognized it.”

“Likewise is there little doubt that one who as a mere investor passively received his income from

corporate stocks and bonds is not carrying on a business even though prudence requires that he change his investments from time to time. . . .

“The line of demarcation between a passive investor and one whose activities place him in the category of those carrying on business has been clearly recognized by the Board of Tax Appeals, *Alice P. Bachofen von Echt*, 21 B.T.A. 702 (C.C.H. Dec. 6543), upon rehearing November 8th, 1932; *Caroline T. Kissel*, 15 B.T.A. 1270 (C.C.H. Dec. 5034), April 15th, 1929. In each case the taxpayer was an investor, but an active one.

“It would be impossible in the brief space of an opinion and serve no useful purpose to detail all her activities. It is sufficient to say that they were **extensive, varied, continuous and regular**, and in no substantial manner to be distinguished from the activities of the taxpayer in the *Kissel* and *von Echt* cases, and in that of *Bula E. Crocker*, 27 B. T.A. 588 (C.C.H. Dec. 7905) cited by the dissenting Board member.”

The principle of those cases applies with greater force in the case at bar because **here the taxpayer is a corporation chartered to engage in business for profit and not an individual.**

It is argued that the securities sold in 1936 and 1937 were purchased some years prior thereto. But that does not mitigate against the fact that they were held primarily for sale. If purchased with the intention of resale and held for that purpose, the length of time that they were so held is unimportant. In the **Black case**, 45 B.T.A. 204, the property was held 11 years. The Board held that that did not make the property capital assets in view of the evidence that the property was bought for re-sale and so held thereafter.

In the **Fuld** case the securities were owned for several years prior to resale. In fact they were purchased at a time when the taxpayer was not engaged in the business of buying and selling securities. They were purchased when he was merely an investor. He later engaged in the business of buying and selling and thereafter held those securities for the purpose of resale. It was held that the securities were not capital assets. Thus the period of time the particular securities were held (even though the original intention was not for resale) does not make the securities capital assets.

It is pointed out that the taxpayer received "dividends on stock in substantial amounts" but the receipts of dividends is merely incidental to the stock ownership. The receipt of dividends would only be significant if the stock had been purchased for investment merely. But when purchased for the purpose of resale the receipt of dividends is incidental. In the **Black** case the taxpayer received \$7,000 a year rental from the property in question from a tenant who held possession under a lease and it was held that the receipt of rent from the property was merely incidental to its ownership.

It is asserted that the taxpayer's president admitted that the securities were purchased as investment and his testimony at page 120 is referred to. The testimony is as follows:

"Q. Now, Mr. Farrell, you testified that you were buying and selling securities for the corporation for a profit to the corporation, for an invest-

ment for the corporation, isn't that right?

A. For what?

Q. The corporation was investing in stocks, wasn't it?

A. Yes.

Q. Yes, and you as president and secretary of the corporation handled that end of the business?

A. Yes."

It is obvious that Mr. Farrell understood the term as used in counsel's cross question in the sense that all property purchased is in a large measure an investment. The retail merchant invests in merchandise and the "dealer" in securities invests in securities. The word "investment" is used in the same breath as the word "profit". The question includes both words. Moreover this excerpt must be read in the light of all his testimony.

The real question is whether the property was "held" "primarily" for sale or whether it was held for the purpose of deriving revenue therefrom. While the term "capital assets" is defined by the statute the very definition and exceptions indicate that basically the term is employed in about the same sense as it is understood in business generally. In business any property that is acquired for the **purpose of resale** and to make a **profit** therefrom is treated as merchandise in a broad sense. But property that is bought and retained for the purpose of **deriving revenue** therefrom such as **rent, interest, dividends** and the like is regarded as capital. If one buys machines for the purpose of reselling them and making a profit, the machines are merchandise. If he buys the same machines for the purpose of utilizing them to manufacture articles from

the sale of which he hopes to make a profit, they are capital assets.

The farmer who has a herd of cows for the purpose of milking them and selling the milk and cream holds the cows as capital assets and an incidental purchase or sale from time to time to improve his herd would be purchase or sale of capital assets. But if the same farmer bought and sold milk cows as a regular business, the cows would be merchandise and the revenue derived from milking while he owned the cows would be merely incidental to the business of trading in cattle.

CASES CITED BY APPELLANT

The cases of

Schaefer v. Helvering, 299 U.S. 171,
Vaughn v. Commissioner, 85 Fed. (2d) 497,
Trading Associates v. Magruder, 112 Fed. (2d)
779, and
Seeley v. Commissioner, 77 Fed. (2d) 323.

cited by appellant have no bearing upon the case at bar.

None of the cases referred to above involve the interpretation and application of Section 117(b).

In all of those cases the courts were concerned with the meaning of the term "dealer" as used in other sections and for entirely different purposes.

The **Schaefer** case did not involve the question of "capital assets". It did not involve the question of the allowance or disallowance of any losses. The specific question there involved was whether securities which

the taxpayer had on hand at the end of the tax year in question (1929) were to be valued at cost or market. They were concerned with securities on hand and not securities which had been sold resulting in the loss. The question depended upon the interpretation of **Section 22 of the Revenue Act of 1928 and Treasury Regulation 74, Articles 101 and 105** (later number Art. 22(c)-5) which was promulgated pursuant to the specific authority conferred by **Section 22**.

The Board of Tax Appeals isolated the issue in the Schafer case as follows:

“They assign as error: (1) the respondent’s determination that the partnership of Schafer Bros. was **not entitled to inventory at market value securities on hand.** The Commissioner determined . . . that they must be carried at cost.”

In determining that issue the Board pointed out:

“However, the purpose of the statute and the quoted regulation was to provide a means for the correct reflection of income **resulting from a definitely limited character of business.**”

and again the Board said:

“The meaning of ‘dealer in securities’, as **defined in the controlling regulation**, has been considered many times by the courts, and this Board.”

The inapplicability of that section and said regulations has already been demonstrated (page..... to this brief).

It is highly significant that Section 117(b) is not followed by any Regulations similar to 101 and 105 which follow Section 22.

Neither does the Regulation following Section 117 (b) make any reference to Article 105 or any other section or regulation for the purpose of incorporating definitions or interpretations contained therein.

The **Vaughn** case involved the same statute and regulations and the same issues as the **Schaefer** case. There, too, the question was as to the right of the taxpayer to employ inventories as to securities on hand and what has been said in reference to the **Schaefer** case is equally applicable to the **Vaughn** case.

In the **Seeley** case, 77 Fed. (2d) 323, cited by appellant, the issue was stated by the court as follows:

“This appeal raises the question of taxpayer’s power to have his income tax for the year 1929 computed by the use of inventories under Section 22(c) of the Revenue Act of 1928.”

The inapplicability of that section to the case at bar has already been demonstrated. The interpretation or application of Section 117(b) was not raised, discussed or passed upon by the Court. The taxpayer in that case was a speculator buying and selling stock on margin and as such the court held that he was not a “dealer in securities” as defined in Regulation 22 (c)-5. The reasoning employed in that case and the comparison which the Court made between that case and the case of **Re Hall**, 29 B.T.A. 1255, even when applied to the term dealer in securities supports our views. In the **Hall** case the Board held the taxpayer to be a dealer in securities and entitled to inventory the unsold securities at market, because in that case the taxpayer bought and sold securities as a business. He was not

merely speculating on margin as in the **Seeley case**. The contention was made in the **Hall case** that because the taxpayer sold his securities through brokers that he was not selling "to customers" and did not therefore come within the purview of Regulation 22 (c)-5, but the Board held:

"He argues that the partnership did not make sales of its securities to customers, because one who deals on a stock exchange is not a merchant in securities, selling to customers. . . .

We see no reason why a broker, in such circumstances, may not properly be regarded as a customer of the partnership

We know of no good reason why a broker, even though acting for an undisclosed client, should not properly be regarded as a customer in the making of repeated purchases of securities owned and held for resale by the partnership.

"In our opinion, however, the controlling factor here is not the method by which the partnership obtained customers or made sales. It is the fact that the partnership purchased securities and held them not for investment or speculation, but for resale at a profit to anyone who desired to buy.

"A grocery merchant might, and as a matter of common knowledge often does, purchase goods through a broker, and he might resell through a broker or agent or clerk to whom he pays a commission. But such method of carrying on his business would not change the fact that he was a merchant in groceries, if he purchased and carried groceries in stock for resale at a profit to customers."

The **Trading Associates case** did not involve the interpretation or application of Section 117(b). It in-

volved the interpretation and application of **Section 351(a) of the Revenue Act of 1934** and the **Regulations, Article 351-2** promulgated in connection therewith. This statute and the regulations define "personal holding company". The statute excepts "regular dealers in stock or securities". The **Regulation 351-5** makes its own interpretation of "dealers in securities" which is to a large extent similar to but not the same as **Regulation 105** (Art. 22(c)-5) referred to above, but the statute and regulations involved in that case differ radically from the statute and regulations involved in the case at bar, so far as the issue of "capital assets" is concerned.

It is significant that in each instance where the term "dealer in securities" is used, that the regulations include a comprehensive definition and interpretation of that term as it is to be used in that connection, while in the regulations following Section 117(b) there is no definition or interpretation similar to the regulations following the other sections. Indeed, there is no regulation which purports to interpret the meaning of the term "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business".

In the **Trading Associates** case there was no issue as to whether the securities bought or sold constituted capital assets. It did not involve the allowance or disallowance of any "loss". The only question there involved was the status of the taxpayer as a "personal holding company".

The application of **Section 351** is involved only to the extent of determining the **status** of the appellant as a "personal holding company" in 1937. It has no bearing upon the question whether the securities were "capital assets" in either year. That question is governed by **Section 117(b)** solely.

The **Burnett case** involved the deduction of losses sustained by an **individual taxpayer**, not a corporation. The loss resulted from "stocks and commodities" held in her **margin** account with brokers. The case involved the Revenue Act of 1934. The Circuit Court of Appeals held:

"Under the rule laid down in *Higgins vs. Commissioner* the investment or speculative activities of the taxpayer were not sufficient to warrant a conclusion that she was engaged in a trade or business within the meaning of Section 23(e) (2) of the Revenue Act of 1934."

Section 23(e) deals entirely with "losses by individuals". Losses by **corporations** is dealt with in Section 23(f). In the case of individuals the losses are deductible.

- "(1) If incurred in trade or business; or
- (2) if incurred in any transaction entered into for profit though not connected with the trade or business."

These limitations are not attached to subdivision (f) of section 23 relating to corporations. It reads:

"In the case of a **corporation** losses sustained during the taxable year and not compensated for by insurance or otherwise."

The decision by the Board of Tax Appeals in the **Burnett case**, 40 B.T.A. 605, does not set forth any findings of fact or any summary of the evidence as to the manner in which the taxpayer carried on her transactions. There is only the bare conclusion that "petitioner's stocks and commodities held in her **margin** account with brokers were not held for sale to customers in the ordinary course of taxpayer's trade or business within the meaning of the Revenue Act of 1934". The decision of the Circuit Court of Appeals does not set forth any summary of the evidence or pertinent facts from which that determination was made. The only comparison that can be made is that there the taxpayer operated a **margin account** with brokers while the taxpayer in the case at bar bought and sold outright and held the securities purchased primarily for sale, which is diametrically opposed to the finding made in the **Burnett case**.

Insofar as the Circuit Court of Appeals discusses the application of Section 117(b) it is quite apparent that the Court erroneously applied the test of "dealer in securities" as defined in regulation Article 22(c)-5 (1934). The Court held:

"There is substantial evidence to support the finding of the Board that Mrs. Burnett was not a 'dealer in securities'
The taxpayer was not entitled to use inventories in determining net income"

These factors are not present in Section 117(b).

In this respect the decision of the Court of Appeals of the Fifth Circuit is diametrically opposed to and

ignores the tests which this court has adopted and adhered to for determining what are "capital assets" within the meaning of 117(b).

Ehrman v. Commissioner, *supra*.
Commissioner v. Boeing, *supra*.
Richards v. Commissioner, *supra*,
Miller v. Commissioner, *supra*.
Jackson v. Commissioner, *supra*.

In the case of **Farr vs. Commissioner**, 44 B.T.A. 683, cited by appellee, the taxpayer was a member of a partnership composed of eight members. The partnership was engaged in the stock brokerage business, buying and selling for others, but it also bought and sold stocks for its own account. "The firm did not solicit sales (of its own securities) to private persons." **The firm treated the stock purchased for its own account as capital assets in its accounting system, reported them as such in the partnership returns and made distribution of profits to the partners on that basis.** But the individual partner, the taxpayer in that case, in making his own income tax return, did not treat such stocks as capital assets and reported a loss of his share of the loss sustained by the partnership upon the sale of securities in the current tax year. The Board of Tax Appeals, in rejecting the taxpayer's contention, recognized that the taxpayer's contention was "persuasive" but felt itself bound by the decision in the **Burnett case**. The **Farr case** is distinguishable upon the facts. The individual partners' position was inconsistent with the status accorded the securities by the partnership itself in its accounting practices, distribution of profits and in making the firm's income

tax return. Obviously the individual partner could not acquiesce in that treatment by the partnership, accept his share of the profits from the partnership upon that basis and then reject that basis for the purpose of reporting his own income tax. Furthermore the practice of buying stock for the firm's own account was merely incidental to its business which was that of stock brokerage, the buying and selling of stock on the stock exchange for others. It is obvious, too, that the Board in that case erroneously applied the "dealer" and "merchant" test which is not applicable under **Section 117(b)**.

The Board was clearly in error when it said that the 1934 amendment to **Section 117(b)** was designed to make it mean the same as **Section 23(r)** (now 117(d)), for 117(b) defines "capital assets" while 23(r) was (117(d)) is merely a limitation or deduction if the loss is from capital assets as defined in 117(b). If it had been the intention of the Congress to make **Section 117(b)** applicable to dealers as that term was used in other sections of the act and as interpreted in the regulations following those sections, the Congress would have employed the same language or would have referred to those definitions.

The **Farr case** and the **Burnett case** are not in harmony with the views of this court as to the proper test to be applied to **Section 117(b)**. Those two cases ignore the elements of regularity and continuity, the test to which this court stands committed.

In the **Burnett case** the taxpayer traded altogether on margin. Stocks held on margin cannot be said to be

stock held for sale to customers in the ordinary course of business. A margin account is in reality merely a gamble on the turn of the market. The speculator never does have either possession or title to the stock which he buys or sells on the market. That is not true with the outright buyer of securities. The decisions in both cases were largely predicated upon the fact that the taxpayer was engaged in **margin trading**.

RE LEGISLATIVE HISTORY

It is asserted that soundness of the decisions in the **Burnett and Farr** cases (Page 15) is demonstrated by the legislative history of **Section 117 of the Revenue Act of 1936**.

We submit that the excerpts and references which follow (except the quotation on page 20) do not refer to **Section 117(b)**. They have reference to other sections of the act which set up their own definitions for the specific purposes therein described.

The legislative history of **Section 23(r)** later made **117(d)** is not relevant for it only fixes a limitation. The limitation on the amount of losses which was introduced in 1932 was not accomplished by changing the definition of "capital assets". In 1932 the section which corresponds to **117(b)** was **101(c)(8)**. It read.

"Property held by the taxpayer primarily for sale in the course of his trade or business."

No change was made in that phraseology when the changes were made in **Section 23(r)**.

In 1934 the provision limiting capital losses to \$2000.00 was transferred from 23(r) to 117(d) and that became the provision of limitation. The only change that was made in **Subdivision (b)** was the introduction of the words "to customers" and the word "ordinary". The references made on Pages 16 and 17 of appellant's brief refer to the amendment of **Subdivision (d)** which fixes the limitation, but not to **Subdivision (b)**, which defines capital assets. Nothing that was said in those committee reports was said with reference to **Subdivision (b)**.

On Page 18 appellant discusses the first of the two clauses in **Subdivision (b)**, to-wit: the exclusion of stock in trade which would properly be included in the inventory. We are not concerned with the interpretation of that clause. We are concerned only with the concluding clause.

On Page 19 it is argued that for sale "to customers" must be construed in accordance with the provisions of **Article 22(c)(5) of Regulations 94**. But that regulation has nothing whatever to do with the definition of capital assets. **Section 117(b)** defines capital assets. The regulation referred to does not attempt to deal with the question as to what is and what is not capital assets. It only determines when and under what circumstances "dealers in securities" as defined "for the purpose of this rule" may or may not be permitted to use inventory values for the purpose of computing gross income with respect to securities which are on hand. It has nothing whatever to do with determining what is "capital assets".

Attention is called to the fact that the phrase "for sale to customers" was used in the committee report on **Section 23(r) of the 1932 Revenue Act**. The fact remains that the phrase was not incorporated into that act and even if it had been incorporated therein, it would not affect the interpretation of the definition in **117(b)** because **23(r)** (now **117(d)**) is only a limitation if the loss results from sale of capital assets. It does not define capital assets. **117(b)** defines the term.

The only excerpt from any committee report which discusses **Section 117(b)** is the phrase quoted on Page 20 of appellant's brief reading:

"Thus making it impossible to contend that a stock **speculator** trading on his own account is not subject to provisions of Section 117."

This observation cannot be stretched into meaning that investors in securities whose investment business is extensive and regular and continuous so as to constitute a business, is eliminated from the last clause of **117(b)**. The business of investment in securities is not even referred to in that observation. Neither is there any intimation in that observation that only a dealer in securities, as the term is used in **Regulation 22(c) (5)** is to be excluded from the operation of the last clause of **117(b)**. The only one referred to in the observation is "**speculator**" and that obviously has reference to the one who trades on margin and is in and out of the market to make a profit on the turn of the market. There is not the slightest suggestion in that observation that it was intended to deal with those who buy and sell securities as a regular business on an

extensive basis and maintains a regular place of business for that purpose and devotes all or substantially all of his time to the management and operation of that business.

There is no warrant for the assumption that the Congress "believed" that the term "to customers" would be construed as applying to merchants or dealers of securities, as the term is used in other sections, or that the Congress intended to change the law as it was laid down in the **Purdy case**, 32 B.T.A. 542, *aff'd*. 102 F. (2d) 331 (1st Cir.). If the Congress had intended to exclude from the definition of capital assets only such securities as were held by "dealer" or "merchant" of securities as the term was used in other sections reference to those sections would have been made or similar language would have been employed.

If the addition of the words "to customers" and "ordinary" had been intended to affect as extensive a change in the interpretation of the language of **Subdivision (b)** as is here contended for, one would expect to find a substantial change in the regulations promulgated by the Treasury Department following the section. The Treasury Department would have at once supplemented the regulation to state its interpretation in language which would make clear that it was intended to limit the exception to dealers or merchants in securities.

A comparison of the regulation following **Section 101** of the 1932 Act (**Article 501, Regulations 77**) with the regulation following **117(b)** of the **Revenue Act of**

1934 (Article 117-1, Regulations 86) discloses that the Treasury Department did not so construe the amendment. All that is there said is:

“The term ‘capital assets’ includes all classes of property not specifically excluded by Section 117 (b). The term is not limited to stocks and bonds nor to property held for more than two years. In determining whether property is a ‘capital asset’ the period for which held is immaterial.”

There is no suggestion in that regulation that the act as amended was to be construed or was construed by the Treasury Department as here contended for. The corresponding regulation in 1936 was no more extensive.

It is argued in effect (p. 20) that the committee had confidence that by the insertion of the words “to customers” that section 117(b) would then be construed in accordance with the definition of “dealers in securities” as laid down in Regulation 22(c)(5). There is not the slightest foundation for this assumption. If the Congress wanted to limit the application of the last clause of 117(b) to those who came within the category of Article 22(c)(5), it would have said so in so many words or would have referred to that regulation.

Neither is there any justification for the assertion that the committee was led to believe that the amendment would read into section 117(b) the definition contained in Article 22(c)(5) by any “judicial construction”. Not a single case is cited which in the slightest degree lends weight to such an idea.

POINT II.

Even if the securities sold were capital assets the full loss must be deducted to determine the existence of "undistributed profits" because the penalty is imposed on undistributed profits in fact, available for distribution as dividends to stockholders as defined in Section 115 of the Revenue Act and not upon statutory net income.

SUMMARY OF ARGUMENT

A.

The purpose of imposing a penalty for failure to distribute profits was to force payment of dividends to stockholders so that they would become subject to surtax. This purpose negatives the idea that the penalty is imposed where there are no profits to distribute.

B.

The statute imposing the penalty must be construed most strongly against the government and in favor of the taxpayer.

C.

While "net income" may be determined by application of the statutory formula, "profits" available for distribution cannot be created by legislative fiat. A corporation cannot be penalized for failure to distribute when it has no profits to distribute.

D.

Both sections here involved impose the penalty on the "undistributed" profits. This presupposes the existence of profits in fact which could be distributed as dividends and not mythical profits.

E.

Section 115 defines dividends as any distribution of "earnings or profits".

F.

For the purpose of determining the existence of "undistributed" profits, the entire loss from sales of securities must be deducted even though deemed to be "capital losses" and when so computed appellee had no undistributed profits in either of the two years in question.

ARGUMENT

Assuming without conceding that the losses resulted from the sale of capital assets, they must nevertheless be deducted in full for the purpose of determining the existence of "undistributed" profits and it is conceded that if the entire loss was deductible appellee had no "undistributed" profits in the two years in question. There is no issue of fact in this respect and if this contention is sustained all other questions in the case become moot.

It must be remembered throughout that Sections 14 and 352 do not impose a tax on "net income".

The tax on "net income" of a **corporation** is provided for in Section 13. They impose a **penalty** for failure to distribute profit. This distinction must be kept in mind in considering the construction and application of the two sections.

The Sixteenth Amendment to the Constitution authorizes the imposition of a tax on "income". A penalty has been held to be income and authorized by the

Sixteenth Amendment **only** when it is a means of preventing evasion and enforcing the collection of taxes on income. A penalty to force distribution of profits, so that share holders could be taxed on the income so received, would be deemed a tax on income.

But if the corporation had no profits in fact to distribute, the penalty is then imposed on a failure to distribute "capital" and not "income" and does not come within the Sixteenth Amendment which authorizes a tax on income.

The "undistributed profits" Act was enacted in 1936 and was made applicable to that tax year.

At that time there were already in existence statutes designed to prevent the use of the corporation as an "incorporated pocketbook" for the purpose of avoiding the imposition of surtax on the individual stockholders, to which they would become subject upon distribution of corporate earnings as dividends.

Section 102 deals specifically with corporations which were "formed or availed of" in a given tax year for the purpose of avoiding the imposition of surtax on stockholders.

Section 351 "cracked down" on "a personal holding company" if it failed to distribute its profits, and for that purpose the holding company was given a statutory definition which brought within its ambit many corporations which were not holding companies in the sense in which the term was generally understood.

The purpose of the Act was:

“(1) to prevent avoidance of surtax by individuals through the accumulation of income by corporations, (2) to remove serious inequities and inequalities between corporate, partnership and individual forms of business organization, and (3) to remove the inequity as between large and small shareholders resulting from the present flat corporate rates.”

(House Ways and Means Committee Report.)

Section 14 died in infancy. In 1938 the law was **entirely overhauled** and every feature of it which laid the tax upon “undistributed profits” was eliminated. Even the title “undistributed profit” was expunged and there was substituted the title “tax on special classes of corporations”. Corporations were divided into classes according to the size of the income and a rate of taxation based upon such graduated income was incorporated. It ceased to be an “undistributed profits” tax.

In 1939 “the remaining vestiges of undistributed profits tax” were completely removed. (Mertens Law of Federal Income Taxation, Page 1581).

We respectfully invite attention to the following rules of construction as applied to revenue acts.

Statutes levying taxes should not be extended by implication beyond the clear import of the language used,

“or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.”
(Gould vs. Gould, 245 U.S. 151.)

This applies with greater force to taxes which are in the nature of penalties.

Mead Corp. v. Commissioner, 116 Fed. (2d) 187 (3rd Cir.) (involving penalty for failure to distribute profits).

In **Hoeper v. Commissioner**, 284 U.S. 206, the Supreme Court said:

“That which is not in fact the taxpayer’s income cannot be made such by calling it income.”

Neither can that which is not profit constitute “undistributed profit”.

Tax laws should be construed and applied

“with a view of avoiding so far as possible unjust and oppressive consequences. . . .” (**Farmers’ Loan & Trust Co. v. Minnesota**, 280 U.S. 204.)

In **United States v. Ryan**, 284 U.S. 167, the Court said:

“A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.”

In **Rhodes v. Commissioner of Internal Revenue**, 100 Fed. (2d) 966 (6th Cir.), the Court said:

“Common sense interpretation is the safest rule to follow in the administration of income tax laws. Gross income and deductions flow from trade, commerce and dealings in property carried on in the ordinary business way and **in the determination of taxes men should measure both by ordinary, everyday business standards.** Compare **Woolford Realty Co. v. Rose**, Collector, 286 U.S. 319, 332 (3 U.S.T.C. Sec. 938); **United States v. Hardy**, 74 F. (2d) 841 (4 C.C.A.) (35-1 U.S.T.C. Sec. 9060).”

In *Washington Southern Co. vs. Baltimore Co.*, 263 U.S. 629, Judges Brandeis said:

“To ascertain the true meaning of the rule, the operation and effect of the construction urged must be considered.”

A fact cannot be brought into existence by “legislative fiat,” which does not and cannot be made to exist “in actuality”. (*Heinier vs. Dounan*, 285 U.S. 312.)

And so we contend in this case that profits available for distribution cannot be created by “legislative fiat”. That is so because the penalty is for failure to distribute and a corporation cannot distribute profits when it did not earn any in fact.

The emphasis must be on the term “undistributed” which presupposes that there are profits to distribute. Distributable profits can no more be created by legislation than by magic.

The first cause of action involves Section 14 of the Revenue Act of 1936 which is titled “**Surtax on Undistributed Profits**”.

The second cause of action involves Sections 351-357 of the Revenue Act of 1937 titled “**Surtax on Personal Holding Companies**”.

The former imposes a tax of certain graduated percentage of “undistributed” net income (Section 14(b)) and the latter imposes a tax on the “undistributed” adjusted net income (Section 351).

In both cases it is a tax on that which is “undistributed” and this **pre-supposes the existence of profits**

in fact which could have been distributed as dividends to stockholders and were not distributed.

Distribution of profits by corporations are made by means of dividends and dividends are defined in Section 115 as any distributon made by a corporaton out of "earnings or profits". Indeed that is the accepted understanding of the term dividend, even in the absence of statute. Distributions of capital are regarded as liquidating dividends. Since the surtaxes are imposed upon the "undistributed" profits earned in the **current** tax year there must, of course, be profits earned in that year available for distribution. Of course if a corporation sustains losses in a given year through any cause whether it be from the sale of assets or excessive operation expenses or through fire, accident or other causes, which are greater than its profits, there cannot be any profit in fact and hence no "undistributed profit".

The surtaxes on "undistributed profits" relates only to profits earned in the **current tax year**. They do not penalize failure to distribute earnings of **prior** years (Corporate Investment Co. vs. Commissioner, 40 B.T. A. 1156—see text at page 87 of Appendix.)

Statutory net income does not truly reflect the taxpayer's **actual earnings** during a given year and would deprive the Government of the right to the application of the penalty in many cases where there is **actual profit** in the year's operation, **although no statutory taxable income**. For example, a corporation may have income of \$10,000 from normal operations and in addi-

tion thereto \$50,000 of income from Government securities which are exempt for normal tax purposes. Thus the taxpayer has an actual income of \$60,000 and yet it has only a statutory taxable income of \$10,000. In such a case, if the statutory net income is to be the test in determining whether there is "undistributed" profits, then the taxpayer would not be subject to the surtax even though \$50,000 of the year's income remains "undistributed".

The revenue law permits many deductions in arriving at net income which result often in wiping out statutory net income, notwithstanding the fact that there was **actual profit in the year's operation**.

Obviously Congress never intended that Section 14 should not apply to cases where there were **actual profits** available for distribution as dividends and yet no statutory net income.

On the other hand, there are cases in which there may be statutory net income and yet **no actual profit** because the Revenue Act only permits certain specific deductions for the purpose of arriving at statutory net income. A corporation may actually pay very large salaries to officers yet it would not be permitted to take a deduction for all of the salaries so paid over and above an amount which the Commissioner deems reasonable. Many other limitations are placed upon deductions in arriving at statutory net income so that the statutory net income bears no relation to the actual result of the year's operation.

Obviously the existence of "undistributed profits"

cannot be computed on the basis of statutory net income in the latter case, and upon the basis of actual net profits in the former case.

The Internal Revenue Department has itself ruled that losses sustained must be deducted in full in order to determine the existence of "undistributed profits".

Income Tax Ruling 3253,—1939—1 Cumulative Bulletin, Part I, Page 178, is as follows: (See text of ruling, p. 83 of Appendix.)

This was a clean-cut ruling that the **entire loss** must be deducted in determining "undistributed profit".

The idea that net loss can be tortured into being profit, was apparently shocking to the **Supreme Court**.

In **Woolford Realty Co. v. Rose**, 286 U.S. 319—52 Sup. Ct. 568 the Supreme Court, speaking through Justice Cardozo, said:

"There are two fundamental objections to this method of computation. In the first place, an interpretation of net income, by which it is also a net loss, involves the reading of the words of the statute in a strained and unnatural sense. The metamorphoses is too great to be viewed without a shock. **Certainly the average man suffering a net loss from the operations of his business would learn with surprise that, within the meaning of the Congress, the amount of his net loss was also the amount of his net income.**"

If a dividend must be paid out of capital or earnings of prior years, it cannot be distribution of "earnings or profits" of the **current year**.

There is no language in Section 117(d) which spe-

cifically requires that the \$2,000.00 limitation should be applied to the computation of undistributed profits. Section 117(d) in its present form was enacted in 1934 prior to the enactment of Section 14 (1936), so that it cannot be said that it was contemplated when enacted that it would be applied to the computation of undistributed profits.

Section 14 contains no language which makes applicable the \$2,000.00 limitation in computing undistributed profits.

To adopt appellant's theory we would have to imply the application of the limitation. But statutes are never construed to imply the imposition of penalties and certainly not to produce "unjust and oppressive consequences".

It is argued that the existence of undistributed profits must be determined by the formula outlined in Sections 21, 22 and 23 of the Revenue Act. But those acts merely provide the formula for computing the normal tax. They are not designed as a formula for computing "undisputed profits".

In the **Weyerhauser case**, 33 B.T.A. 594, it was argued that "earnings and profits" must be computed in the same manner as "statutory net income" and the Board said:

"This argument loses sight of the fact that Congress, in enacting section 23, was concerned only with deductions to be allowed in computing net income; it was neither defining earnings and profits, nor providing a method for computing them."

In that case it was the taxpayer who was urging that earnings and profits should be computed in accordance with the formula in Sections 21, 22 and 23. The Commissioner of Internal Revenue took the opposite view and was sustained by the Board of Tax Appeals. See text of decision, p. 84 of Appendix.)

The Supreme Court rejected that idea in *U. S. vs. Pleasants*, 305 U.S. 357. There, too, the Commissioner attempted to apply the same formula. The Court said:

“We are not impressed with the argument based on the provisions of Sections 21, 22 and 23, 26 U. S.C.A. §§ 21-23. True, Section 21 provides that ‘net income’ means gross income computed under Section 22 less the deduction 23. Section 22 defines gross income and Section 23 provides for deductions, including deductions for losses. **But Sections 21, 22 and 23 are not to be construed so as to derogate from the special and explicit provisions of Section 101(b).**” (1932 Act same as 117(b) 1936 Act.)

The Board of Tax Appeals and the courts have recognized and have given effect to a clean-cut distinction between “statutory net income” and “earnings or profits”. The former is a purely statutory concept and does not take into account all of a taxpayer’s income (for it excludes revenue derived from government, state, county, etc. bonds (Sec. 22(b)(4) and other types of securities), and does not take into account all deductions which go to decrease or wipe out profits. As for example, the \$2,000 limitation on capital losses, and extraordinary legitimate expenditures not allowable for statutory income tax purposes.

Whereas the latter term “earnings or profits” deals

with realities, profit or loss in fact and not the arbitrary statutory concept.

A taxpayer may or may not have net income for normal tax purposes within the arbitrary statutory provisions but "dividends" can only be paid out of **actual profits** and not profit by fiat.

In *Chas. F. Ayer v. Commissioner*, 12 B.T.A. 284, the Board of Tax Appeals clearly pointed out the difference between "net income" upon which income tax is paid and "profit" out of which dividends are paid, and concluded by saying:

"It therefore follows that the earnings or profits mentioned in section 201(a) of the Revenue Act of 1921 (same as Sec. 105 of 1936 Act) are **not the equivalent of the taxable net income** of the corporation. In this connection see *National Grocery Co.*, 1 B.T.A. 688, and *Lynch v. Hornby*, 247 U.S. 339."

In *W. S. Farish & Co. v. Commissioner*, 38 B.T.A. 150—affd. 104 Fed. (2d) 833 (5th Cir.), the Board of Tax Appeals held:

"The rule (computation according to statutory formula) is **applicable only in computing taxable net income**, that is, the income upon which Congress has levied a tax. Thus, **taxable net income** is purely a statutory concept, and bears no relation to gains and profits subject to distribution as dividends. (Citations.) It is the **actual gain or loss** which affects the corporation's capital and **determines whether there is earned surplus, or a deficit** which impairs the capital."

In *McKinney v. Commissioner*, 32 B.T.A. 450—affd. 87 Fed. (2d) 811, the Board of Tax Appeals said:

"The substance of the government's argument seems to be that the statute requires that 'earnings or profits' of a corporation, as the term is used in section 201, *supra* (same as Section 115) must be determined in the same manner and on the same basis as its taxable income. That the statute does not so provide is, in our opinion, well settled. See our discussion in *Charles F. Ayer*, 12 B.T.A. 284.

Section 201(d) on its face distinguishes between 'earnings or profits', as used in subsection (a), and taxable net income"

In *Elmhirst v. Commissioner*, 41 B.T.A. 348, the Board of Tax Appeals held:

"We first examine the question of proper basis for computation of **profit or loss**: Respondent concedes that the Board has decided this question adversely to him in *W. S. Farish & Co.*, 38 B.T.A. 150, and *Ida I. McKinney*, 32 B.T.A. 450; *affd.* 87 Fed. (2d) 811, to the effect that for the purpose of ascertaining the amount of earnings and profits available for distribution as dividends, **cost** to the corporation should be used **rather than** the **statutory basis for determining gain or loss for purpose of computing tax**. Since *W. S. Farish & Co.* has been affirmed, 104 Fed. (2d) 833, by the Circuit Court of Appeals for the Fifth Circuit, and since the same conclusion, in effect, in *F. J. Young Corporation*, 35 B.T.A. 860, has been affirmed by the Circuit Court of Appeals for the Third Circuit, 103 Fed. (2d) 137, further discussion of this point is unnecessary, and we hold, in accordance with said cases, that the proper basis is the basis of cost to the corporation. The **same decisions require a holding against the respondent upon** two minor items entering into the **computation of profit or loss** of the corporation, to-wit, whether \$287,586.36 is an allowable deduction for losses for 1932 from sale of securities held less than two years, losses on wash sales, and taxes; and wheth-

er \$144,979.18 is an allowable deduction for the year 1933 because of adjustment to cost of securities sold, and losses on wash sales. **The same logic dispositive of the above cases indicates that such deductions, though not to be taken into consideration in arriving at taxable net income, should be deducted in computing earnings or profits of the corporation in the determination of avails for distribution."**

In the case at bar we claim the right to deduct losses in full for the purpose of computing the existence of "undivided profits". There is no language in Section 14 (undistributed profits tax Act) or in Section 351 of the Revenue Act of 1937 (personal holding company tax act) which specifically directs that losses (except to the extent of \$2,000) should be excluded in computing the existence or non-existence of undistributable profits nor is there any language in the Acts which makes Section 117(d) applicable in either case.

In the case at bar we are concerned with the question whether profits were made **in the current year** (Foley case, 106 Fed. (2d) 73; Northwest Steel Co. case, 311 U.S. 46, and Crane-Johnson case, 311 U.S. 54) **which could have been distributed as dividends** (not a distribution of capital, or profits made in former years).

Profits or losses in prior years cannot be considered in determining the existence of "undistributed profit" of the current year. (Corporate Inv. Co. vs. Com., 40 B.T.A. 1156, see p. 87 of Appendix.) Profits of prior years pass to surplus account and become capital. (Macomber case, 252 U.S. 189.)

Since the existence or non-existence of profits available for distribution as dividends must be determined from the year's operations as a whole without regard to prior years, the plaintiff in this case had no "undistributed" profits in either year out of which it could have legally declared a dividend. The losses sustained wiped out the earnings for the years and reduced the surplus account.

Under the formula used by the writer of the Treasury Department memorandum when applied to the case at bar there was no undivided profits in the tax year in question.

Appellant is grossly mistaken when it asserts (p. 12)

"That surtax on undistributed profits has been sustained in situations where the corporate taxpayer has had nothing available for distribution."

Three cases are cited in support of this assertion, **Northwest Steel Mills, Crane-Johnson Co. and Foley Securities** cases. In every one of them the corporation actually earned profits in fact in the current tax year. In none of them did the taxpayer attempt to set off any losses against the profits.

In the **Foley** case the profits were actually distributed as dividends. In the **Northwest Steel and Crane-Johnson** cases the profits were not distributed. In those two cases the taxpayer claimed that it was precluded from making such distribution because it was under contractual duty to refrain from doing so, that the contracts came within the provision of **Section 26-c** and

therefore was entitled to the deduction provided for therein.

There were no losses sustained or claimed. There were profits in fact and there is not the slightest intimation in any of those cases that a "surtax on undistributed profits" can be imposed **when there are no profits in fact.**

The validity of the act was attacked in those cases, but it was sustained on narrow ground that the act deals with the income **"for each taxable year"**—"a definite period"—that is, the **current annual profits.** The court held the act valid "as applied" to those taxpayers because they had actually earned profit **in the current year** and it was upon that profit that the surtax was imposed. The reasoning employed, implies that if the surtax had been imposed where there were no actual profits, the act would be deemed invalid.

Assuming without conceding that the losses were "capital losses" they would nevertheless have to be deducted **in full** to determine the existence of "undistributed profits". When so computed there were none in the years in question.

POINT III.

Assuming without admitting that the deduction for the losses are limited to \$2,000.00 in each year, appellee had no undistributed profits in either year because he was entitled to take the deduction of the dividend received credit (26(b)) in determining the existence of "undistributed profits".

ARGUMENT

Section 26(b) of the Revenue Act in force in both years provides that **corporations** should be allowed a credit to the extent of 85 per cent of the revenue received from dividends on stock owned by the company. This credit was provided for, because the corporations paying the dividends had already paid income tax upon the profits which were distributed as dividends.

Section 13 which imposes the income tax on corporations specifically makes section 26(b) applicable. It says:

"As used in this title the term 'normal—tax net income' means the net income minus the sum of—

(2) Dividends received—the credit provided in Section 26(b)."

Appellee took this credit in computing its income tax in both years and its right to do so has not been and is not now questioned.

If appellee is entitled to take this credit in determining the existence of "undistributed profits" then there were no undistributed profits in either year, even

though losses are limited to \$2,000.00. This, too, is not questioned. The findings of fact set forth (Tr. pp. 26 and 27) the essential figures. They are not questioned. The only issue raised in this respect, is the right as a matter of law to take this credit in computing undistributed profits.

These figures show that in 1936 the gross revenue was \$38,873.30. The deductions for salaries, rent, taxes, et cetera were \$14,331.45, leaving \$24,541.85. The dividend received credit (to-wit 85 per cent of \$27,145.09 dividends, Tr. 51) was \$23,073.32. The loss from sale of securities (if 117(d) is held applicable) was \$2,000.00. The total credits are \$25,073.32 which is in excess of the aforesaid profits.

In 1937 the gross revenue was \$43,787.61. The deduction for repairs, interest, taxes, et cetera was \$26,674.11, leaving \$17,113.50. The dividend received credit (85 per cent of \$25,188.70 dividend, Tr. 85) was \$21,410.49, which of course largely exceeds the profits even without any deduction for losses from the sale of the securities.

In a very real sense the dividend received credit in the case of corporations is not a credit at all. When section 26(b) is read together with Section 13, it becomes apparent that the Congress intended that only 15 per cent of the revenue received by corporations from dividends on stock of other corporations should be treated as income.

We submit that section 14 which imposes the penalty on undistributed profits as well as Sections 351

to 356 of the Revenue Act of 1937 (personal holding company act) require the allowance of the dividend received credit in both instances in computing "undistributed profits".

Now Section 26 provides

"In the case of a corporation the following credits shall be allowed to the extent provided in the **various** sections imposing tax—

"(b) Dividend received—85 per cent of the amount received as dividends."

This provision is applicable to **all** sections of the Revenue Act "imposing tax". It is not limited to any particular section or particular tax. The language is very clear. It says as provided in the **various** sections imposing tax.

The provision is comprehensive and cannot be limited in its application to the computation of the normal tax and excluded from the computation of the tax on "undistributed profits".

In the formula for determining the amount of the surtax on undistributed profits, net income is the starting point. Net income so far as **corporations** are concerned must mean the net income as it is computed in the case of **corporations** for normal tax purposes under the formula provided in Section 13 and this requires specifically the deduction of the dividend received credit.

Section 351 of the Revenue Act of 1937, applicable to the second cause of action, imposes the surtax upon the "**undistributed** adjusted net income". The formula

for determining undistributed adjusted net income are provided for in Sections 355 and 356. When read together they make "net income" the starting point for computation. Here, too, the computation must be made in accordance with Section 13 which is applicable to **corporations**, and produces the same result as the computation under Section 14.

Appellant asserts that the dividend received credit is not here relevant (page 10) and in the footnote says that this credit is not allowed in computing the surtax on undistributed profits.

No decisions are cited in support of this assertion. We submit that the sections of the act referred to above require that the dividend receiving credit Section 26 (b) be allowed under **all** sections of the Revenue Act "imposing tax". It is not limited to the sections imposing normal tax only.

POINT IV.

Appellee was not a personal holding company within the meaning of Sections 352 and 353 of the Revenue Act of 1937.

SUMMARY OF ARGUMENT

A.

Appellee was not a personal holding company because revenues from rents constituted more 50 per cent of the gross income.

B.

Gross income for the purpose of these sections is not synonymous with gross receipts.

C.

“Gross **income**” within the meaning of sections 352 and 353 must be computed by deducting from gross “**receipts**” the cost of the property. As so computed, the rents were more than 50% of the gross income.

ARGUMENT

A “personal holding company” is defined as follows:

Sec. 352. . . . the term “personal holding company” means any corporation if—

(a) at least 80 per centum of its gross **income** for the taxable year in personal holding company income as defined in section 353.

Sec. 353 “. . . for the purpose of this title the term ‘personal holding company income’ means the portion of the gross **income** which consists of:

- (a) Dividends
- (b) Stock and Securities Transactions
- (c) Commodities Transactions
- (d) Estates and Trusts
- (e) Personal Service Contracts
- (f) Use of Corporation Property by Shareholder
- (g) Rents.—Unless constituting 50 per centum or more of the gross income.”

Appellee's gross income did not bring it within the foregoing sections of the Revenue Act.

“Gross income” is not synonymous with gross receipts.

Article 402-2 Regulations 101 says:

“In determining whether the personal holding company income is equal to the required percentage of the total gross income, the determination **must not be made upon the basis of gross receipts, since gross income is not synonymous with gross receipts.**”

Article 351-2 Regulation 94 says:

“Gross income is not synonymous with gross receipts. For example, in the case of a sale or exchange of property, it **includes only the excess of the amount realized therefrom over the adjusted basis provided for in section 113(b).**

“Gains from all transactions involving stock in trade, etc., are **determined for the taxable year as a whole instead of separately.**”

Regulation (a)-1 (1938) says:

“Gross income includes in general . . . profits from sales of and dealings in property . . . in general income is the gain derived . . . from . . . profit gained through selling or conversion of capital assets.”

Article 22(a)-5 (1936) says:

“Art. 22(a)-5 Gross Income from Business.—
In the case of a manufacturing, merchandising, or
mining business ‘gross income’ means the **total**
sales, less the cost of goods sold, plus any income
from investments and from incidental or outside
operations or sources”

In **United States v. Guggenheim Exploration**, 238
Fed. 231, the Court said:

“The word ‘income’ is not synonymous with the
word ‘**receipts**’. *Von Baumbach v. Sargent Land*
Co., 219 Fed. 31, 134 C.C.A. 649.”

In **Greensboro Gas Co. v. Commissioner**, 30 B.T.A.
1362 the Board of Tax Appeals held:

“Gross income from business in which sales of
property are involved does not include the cost
of the property sold. The capital outlay for the
cost must be subtracted from gross receipts. **We**
must keep in mind the distinction between gross
receipts and gross income. The depletion deduc-
tion is based **on gross income and not gross re-**
ceipts. The situation represented here is analogous
to that of a merchant who is required to **deduct**
from his gross receipts the cost of goods sold in
determining gross income. It is only the latter
which is the basis for computing depletion in the
case before us.”

From the foregoing regulations and decisions it is
obvious that the gross income of appellee represents
the **receipts** from all sources including the sale of se-
curities less the cost of the securities sold.

Appellee’s “gross income” was derived from the
following:

- (a) Dividends and interest.
- (b) Stock and securities transactions.
- (g) Rents.

Appellee's gross receipts in 1937 were as follows:

From sale of securities.....	\$43,239.27
Interest	180.00
Rents	18,418.91
Dividends	25,188.70
<hr/>	
TOTAL RECEIPTS	\$87,026.88
Cost of Securities.....	\$63,892.06
<hr/>	
GROSS INCOME	\$23,134.82

The amount received from the sale of securities and the cost are shown in the schedule which is part of plaintiff's exhibit 5 and reproduced on page 89 of the transcript. The figures quoted constitute the totals of the two columns headed "sale price" and "cost".

The revenue from interest, rents and dividends is shown in the schedule which is part of plaintiff's exhibit 5 appearing at the foot of page 85 of the transcript. There is no issue in this case as to the accuracy of these figures.

Since the rents were \$18,418.91 they are of course more than 50 per cent of the gross income of \$23,134.82.

Since the rents must be excluded in computing the personal holding company income the remainder which constitutes personal holding company income, to-wit, \$4,715.91, is less than 80 per cent of its total gross income. Appellee does not therefore come within the definition of personal holding company (Section 352).

POINT V.

If the Acts in question are construed so as to preclude the deduction of the total loss in determining the existence of undistributed profits and are not limited to profits in fact, then the Acts as applied to appellee are unconstitutional because (a) they do not impose a tax on income but on capital and (b) they are so arbitrary as to violate the due process clause of the Constitution.

It is recognized that the purpose of both acts here in question was to "compel corporations to distribute their current earnings to stockholders so as to increase their tax liability".

In *Foley Securities Co. v. Commissioner*, 106 Fed. (2d) 73 (8th Cir.), the court said:

"There can be no doubt that the purpose of Congress in enacting Section 351 was to compel each personal holding company to distribute its **current earnings** instead of accumulating them, so as to augment the income of its shareholders thereby increasing the amount of their tax liability."

In *Bastian Bros. Co. v. McGowan*, 32 Fed. Sup. 93, the Court said:

"The statute (referring to Section 14—Undistributed Profit Tax) was enacted to **check evasion** of surtax on corporation earnings by leaving them undistributed. It was within the power of congress to pass laws reasonably regulated to check avoidance of a tax."

We recognize, of course, that penalties can be imposed for failure to distribute current profits, if the

failure is for the purpose of preventing the imposition of the surtax on the stockholders. As such the acts would be an aid to the enforcement of the collection of income tax and therefore in legal contemplation a tax on "income" within the meaning of the Sixteenth Amendment.

But if there is only "statutory net income" and no profits in fact dividends to stockholders cannot be declared and paid out of current earnings.

Under such circumstances a dividend could only be paid out of capital. Profits earned in prior years are deemed to be capital (*Eisner vs. Macomber*, 252 U.S. 189; *Willcutts vs. Milfore Dairy Co.*, 275 U.S. 215). So that if resort must be had to original capital or added capital or earnings of previous years which were passed to surplus account, the penalty would be on the failure to distribute "capital" or "property" and not on income.

In the case at bar the corporation ended both years' operations with an actual loss. It had no current earnings or profits which could under any proper business practice be distributed as a dividend to stockholders. For the purpose of determining the existence of distributable profit it is immaterial whether the loss arose from sale of securities or sale of merchandise or accident or fire or excessive operating costs. Whatever the reason the fact remains that it had no profits in fact in those two years and hence could make no distribution of dividends unless it resorted to earnings of prior years.

We submit that unless the acts are construed as applying only to cases in which there are actual profits in the current year available for distribution, that the acts are invalid because they would not impose taxes on "income" but would constitute a penalty for failure to distribute "property" or "capital".

The Sixteenth Amendment does not authorize the Congress to impose a tax on "undistributed profits".

In *Linder v. United States*, 268 U.S. 5—45 S. Ct. 446, the Court held:

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that **any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adopted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced.** (Citing cases.) In the light of these principles, and not forgetting the familiar rule that 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score', the provisions of this statute must be interpreted and applied."

In *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, the Supreme Court said:

"Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is **whether the means adopted is appropriate to the end.** A legislative declaration that a status of the taxpayer's creation shall, in the application of the

tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, **if reasonably requisite to prevent evasion**, does not take property without due process. But if the means are unnecessary or **inappropriate** to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed.

“There are, however, **limits** to the power of Congress to create a **fictitious status** under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment.”

In *Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206—52 S. Ct. 120, the Court had under consideration a Wisconsin statute which required the income of the wife and children to be added to that of the husband and father for the purpose of computing his income tax. The statute was sustained by the State Supreme Court “on the ground that the statute was **necessary to prevent frauds and evasions** of the tax by married persons.” The United States Supreme Court held:

“The claimed necessity cannot justify the otherwise unconstitutional exaction.”

The case most often cited in support of the validity of taxes on undistributed profits is the case of *Hel-*

vering v. National Groc. Co., 282 U.S. 932. That case involved the Section 102 tax, formerly Section 104. The court sustained the Act because,

“It merely lays the tax upon the corporations which use their powers to prevent imposition upon their stockholders of the federal surtaxes. **‘Congress in raising revenue has incidental power to defeat obstructions to that incidence of taxes which it chooses to impose.’** United Business Corporation v. Commissioner, (2d Cir.) 62 F. (2d) 754, 756.”

An act which imposes a penalty “on undistributed profits” when there are no profits in fact cannot be sustained as an act “to prevent imposition upon their stockholders of Federal surtaxes” nor as an aid to the collection of income tax, because the stockholders would in no event be subject to additional tax when there were no profits available for distribution.

In *Eisner vs. Macomber*, 252 U.S. 189, the Court had under consideration Section 2 of the Revenue Act of 1916 which provided that “net income” should include “stock dividends” and that stock dividends be “considered dividends”. The court in holding the act invalid said that it cannot be construed

“as inseparable from the interpretation of the Sixteenth Amendment”

and it held:

“It is manifest that the stock dividend in question cannot be reached by the Income Tax Act and could not, even though Congress expressly declared it to be taxable as income, **unless it is in fact income.**”

“A proper regard for its genesis, as well as its very clear language, requires also that **this amend-**

and startling doctrine, condemned by its mere statement, and distinctly repudiated by this court in the *Schelsinger* (270 U.S. 250, 46 S. Ct. 260, 70 L. Ed. 557, 43 A.L.R. 1224), and *Hoeper* (284 U.S. 217, 52 S. Ct. 120, 76 L. Ed. 248) cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity.

“However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the *Schlesinger* case, as we are not. . . .”

CASES CITED BY APPELLANT

Appellant cites *Helvering vs. Northwest Steel Mills*, 311 U.S. 46, *Crane-Johnson Co. v. Helvering*, 311 U.S. 54, and *Foley Securities Corporation vs. Commissioner*, 106 F. (2d) 731, in support of the validity of the surtaxes in question as applied to the taxpayer in the case at bar.

The cases cited have no application. In all of the three cases the taxpayers actually earned profits available for distribution in the current tax year. In the *Foley* case the profits were actually distributed as dividends. Those cases merely decided that the acts were valid when applied to actual profits.

Emphasis was placed in those cases on the fact that the tax was imposed on the earnings of the “current year”. They preclude the idea that penalty can

be imposed for failure to distribute earnings of prior years.

In the case at bar the situation is reversed. Here there was no "statutory income" and no profits available for distribution in the current year. There was a decrease in surplus in each of the tax years in question. There is not the slightest suggestion in those cases that the acts would be held valid if construed to impose the penalty for failure to distribute profits when there were no profits in fact.

The Supreme Court did not in the **Northwest Steel Mills case** "reject" the contention made by appellee in the case at bar. That contention was not made and could not be made in that case because as already pointed out the taxpayer had actually earned profits (not merely statutory income). It was income in the current tax year. The validity of the act as applied to a case in which there are no profits in fact was not raised, discussed or passed upon by the Court.

In the case of **Helvering vs. National Grocery Co.**, cited by the appellant, the taxpayer corporation had actual profits (not statutory income) of approximately \$700,000.00 after payment of Federal income tax and the payment of salary of \$104,000 to the sole owner of stock of the corporation. It involved Section 102 of the Revenue Act imposing a surtax upon the undistributed profits. It was held to be constitutional as applied to the taxpayer in that case because it was applied to actual profits and as such it was an incident to the collection of the surtax on stockholders.

There is no suggestion in that case that the act would be held constitutional if applied to a case in which there are no undistributed profits in fact in the current year.

The reasoning employed in that case supports our contention that the penalty imposed by these acts would be unconstitutional if construed to permit imposition of the penalty when there are no profits in fact available for distribution to stockholders.

It is argued (p. 28) that "deductions are matters of Congressional grace" and the case of *New Colonial Co. vs. Helvering*, 292 U.S. 435, is cited. The term "deduction" is there used in a limited sense. It has reference to the purely **arbitrary deductions** which do not relate to the factors entering into the actual determination of profits. The deductions referred to are such as exemptions for the head of a family, for dependents, dividend receive credits and other purely arbitrary deductions which do not by proper accounting methods go to determine the profits or losses sustained in a business.

This dictinction was very clearly pointed out in *Davis v. U. S.*, 87 Fed. (2d) 323 (2d Cir.). (See text of decision, p. 86 of Appendix.)

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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APPENDIX

In **Forston vs. Commissioner of Internal Revenue, 47 B.T.A., Case No. 26**, decided June 23, 1942, the taxpayer was in the contracting business. In 1926 and 1927 it received bonds in payment for services rendered under a construction contract. It disposed of the bonds in 1936 at a loss and took a deduction in that year. The Commissioner disallowed the loss except to the extent of \$2,000.00. The taxpayer was **not** in the business of buying and selling bonds but had on numerous occasions received bonds in payment for services rendered under construction contracts which the taxpayer later sold. The Board held construing the act as amended:

“The facts show clearly that it was the custom in the business of doing construction work for levee districts to make payment for the work in its bonds. . . . The intent always was to sell such bonds The Company’s receipt of the bonds in question in payment for work done, therefore, was not an isolated instance of receiving bonds. . . . The general depression made it impossible for the company to sell the bonds, but the original intent to sell them remained. The business adversity did not convert the original purpose to sell the bonds into a purpose of investment.

“The facts leave no doubt on the point that the bonds came into the company’s possession as a necessary incident to the conduct of its business—to the sale of its services—and they were not received or intended to be held as a capital asset. Disposition of the bonds through sale was likewise essential to the carrying on of its business.

“Under all of the facts it is held that the loss sustained was a loss upon property held primarily for sale to customers in the ordinary course of business. The loss is deductible as an ordinary loss.

Respondent is reversed on authority of the cases above cited."

In **Hercules Motor Co.**, 40 B.T.A. 999, the taxpayer received trade acceptances in payment for merchandise sold. The trade acceptances were sold at a loss. The Commissioner disallowed the loss contending that it arose from the sale of capital assets. The Board held:

"Here the trade acceptances related directly to the sale of the petitioner's products to Amtorg. They had become a usual and regular factor in the petitioner's transactions with that customer and the sales were accomplished largely through the means of such obligations. The receipt was thus necessary to the normal conduct of the petitioner's business. Their disposition likewise became essential. Petitioner offered them to several potential buyers, finding a customer in J. H. Leander, Inc. Petitioner had sold acceptances to other buyers in other years. Such activities, in our opinion, come within the purview of the statutory phrase 'held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.'"

In **Quaker Investment Co. vs. Commissioner**, B.T.A. Memorandum opinion, Docket No. 88723, April 12, 1939, the Board held:

"In General Counsel's Memorandum 9958, Cumulative Bulletin X-2, pages 158 and 159, it was held:

"... this office is of the opinion that a person who buys and sells securities for his own account exclusively may be engaged in a trade or business even though he cannot be treated as a 'merchant' or 'dealer in securities.' and that in a case where property is held primarily for sale in the course of a trade or business section 101 of the

Revenue Act of 1928, pertaining to capital gains and losses, and the corresponding sections of Revenue Acts of 1926 and 1934 do not apply, regardless of whether the transaction results in a gain or in a loss."

"The facts here plainly show that the petitioner was **organized for the very purpose of purchasing and selling securities**

Since the securities in question were held primarily for sale by the petitioner in the course of its regular business, the Board is of the opinion that there is no merit in the respondent's contention that the profit realized from the sale of the securities was from a sale of capital assets."

Income tax ruling 3253—1939—one cumulative bulletin, Part 1, Page 178, is as follows:

"Advice is requested in the case of the M. Corporation relative to the dividends paid credit provided in Section 27 of the Revenue Act of 1936 in the computation of surtax on undistributed profits imposed by Section 14 of that Act.

"The M Corporation keeps its books of account on the accrual basis. At the close of business on December 31, 1936, it had no accumulated earnings and for the calendar year 1937 its books showed net earnings or profits of \$5,000 after taking into consideration a loss of \$5,000, during the year from the sale of securities. As the corporation for Federal income tax purposes, was limited to a capital net loss of \$2,000, its net income for such purposes amounted to \$8,000. The amount of \$8,000 was distributed to stockholders during the year. The question involved is the amount of the dividends paid credit allowable to the corporation.

"While the corporation's net income, for Federal income tax purposes, was \$8,000, in determining its actual earnings or profits for the year available for distribution as dividends this amount must

be reduced by \$3,000, the amount of the loss not allowable for income tax purposes. Furthermore, a proper reserve for the payment of accrued income taxes is deductible in the computation of the earnings or profits, which, in this instance, amounts to \$820. Accordingly, the earnings or profits available for distribution as dividends amounted to \$4,180 (\$8,000 less \$3,000 and \$820). (Cf. G.C.M. 2951, C.B. VII-1, 160 (1928). Since a dividend paid credit is not allowable when the distribution is not paid out of earnings or profits, and since only \$4,180 of the \$8,000 distribution in 1937 by the M Corporation was so paid, the corporation is entitled to a dividends paid credit of \$4,180 under section 27(a) of the Revenue Act of 1936."

In *Weyerhaeuser vs. Commissioner*, 33 B.T.A. 594, the Board held:

"Inferentially he (Commissioner) argues that the phrase 'earnings or profits' should be construed to be synonymous with 'taxable net income'; that since the company had no taxable net income, the distributions to its stockholders were not distributions of earnings and profits and hence were not taxable. Manifestly, this contention cannot be sustained.

" 'Net income', in the language of the statute (Sec. 21, Revenue Act of 1928), 'means the gross income computed under section 22 less the deductions allowed by section 23.' Gross income, as defined by section 22, includes gains, profits and income derived from salaries, wages or compensation for personal services, from professions, vocations, trades and businesses, as well as from interests, rent, dividends, securities and 'income derived from any source whatever.' The section, however, specifically provides for the exclusion of life insurance, annuities, gifts, bequests, devises and interest upon the obligations of a state, territory or any political subdivision thereof.

"The deductions allowed include all ordinary and necessary expenses, interest, losses, bad debts, depreciation, depletion, net losses of prior years to the extent provided in section 117, dividends received from domestic corporations, and dividends from a foreign corporation deriving more than 50 per cent of its gross income from sources within the United States.

"In determining the 'taxable net income' of a corporation, in addition to the deductions set forth above, certain credits are allowed by section 26. It is apparent, therefore, that 'taxable net income' is purely a statutory concept.

"Earnings and profits, on the other hand, are not defined by the act; but they have a settled and well defined meaning in accounting. Generally speaking, they are computed by deducting from gross receipts the expense of producing them. (Citations.) Thus, under the ordinary method of accounting, in computing earnings and profits there will be deducted, not only the items shown above, but others which are not, under the statute, deductible in computing taxable net income. In this classification may be listed such items as extraordinary expenses, charitable contributions, taxes paid the Federal Government, and taxes assessed against local benefits tending to increase the value of the property. (Citations.) Again, many items, such as interest upon the obligations of a state or political subdivision, tax-free Federal securities, and dividends from other corporations, must necessarily be considered in computing earnings and profits, though forming no part of taxable net income.

"But it is argued that the statutory net loss as defined by section 117, 'is a pure business loss', and should be considered in computing earnings and profits for 1928, 'without differentiation from other losses allowed as deductions by section 23'. This argument loses sight of the fact that Congress, in enacting section 23, was concerned only

with deductions to be allowed in computing net income; it was neither defining earnings and profits, nor providing a method for computing them."

In *Davis vs. U. S.*, 87 Fed. (2d) 323 (2d Cir.), the court said:

"It will be well to note at the start that our scheme of income taxation provides for a method of computation whereby all receipts during the taxable period which are defined as a gross income are gathered together and from the total are taken certain necessary items like cost of property sold; ordinary and necessary expenses incurred in getting the so-called gross income; depreciation, depletion and the like in order to reduce the amount computed as gross income to what is in fact income under the rule of *Eisner v. Macomber*, 252 U.S. 189, and so lawfully taxable as such. In this way true income is ascertained by taking from gross income as defined that which is necessary **as a matter of actual fact** in order to determine what as a matter of law may be taxed as income. While such subtractions are called deductions, as indeed they are, they are not to be confused with deductions of another sort like personal exemptions; deductions for taxes paid; losses sustained in unrelated transactions and the other like privileges which Congress has seen fit to accord to income taxpayers under classifications it has established. While the first kind of deductions are inherently necessary as a matter of computation to arrive at income, the second may be allowed or not in the sound discretion of Congress; the only restriction being that it **does not act arbitrarily so as to set up in effect a classification for taxation so unreasonable as to be violation of the fifth amendment**. Such deductions as distinguished from the first kind, are allowed by Congress wholly as a matter of grace.

"The loss which the appellant tried to deduct

from his **unrelated** income falls within the second class of deductions of which mention has been made and so its limitation as in Sec 23(r) was one which Congress could control in its sound discretion without apportionment."

In *Corporate Investment Co. v. Commissioner*, 40 B.T.A. 1156, the Board of Tax Appeals held:

"If Congress had intended to penalize the corporation for accumulating a surplus **in prior years** or for failing to distribute such a surplus in the taxable year, it would hardly have measured the penalty by the earnings of the current year or relieved the corporation from the penalty upon the condition that the earnings of the current year were distributed to or reported by the stockholders. . . Thus it appears that Congress was thinking in terms of **current income** and **current gains and profits** when it enacted the provisions of Section 104. The Bureau has always interpreted similar provisions of section 104. The Bureau has always interpreted similar provisions as referring to 'gains and profits' of and 'availed of' **in the current taxable year**. O.D. 188, 1 C.B. 182; I. T. 1572, C.B. II—1, 139. The decisions of the Board are to the same effect. *United Business Corporation of America*, 33 B.T.A. 83; remanded, C.C.A., 2d Cir., Aug. 31, 1936; *Almours Securities, Inc.*, 35 B. T.A. 61; *affd.* 91 Fed. (2d) 427, (C.C.A., 5th Cir.); *certiorari denied*, 302 U.S. 765; *Dill Manufacturing Co.*, 39 B.T.A. 1023."



